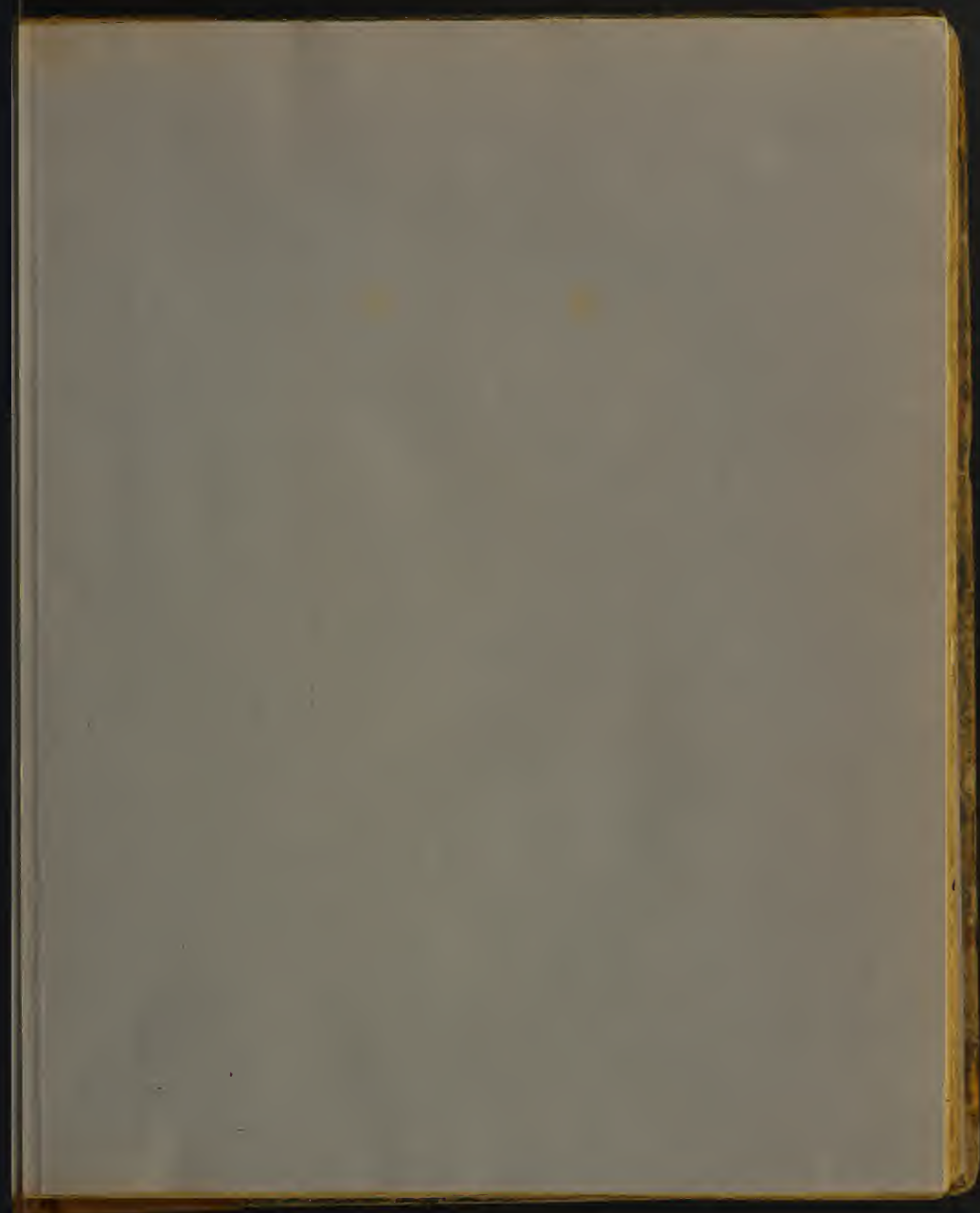
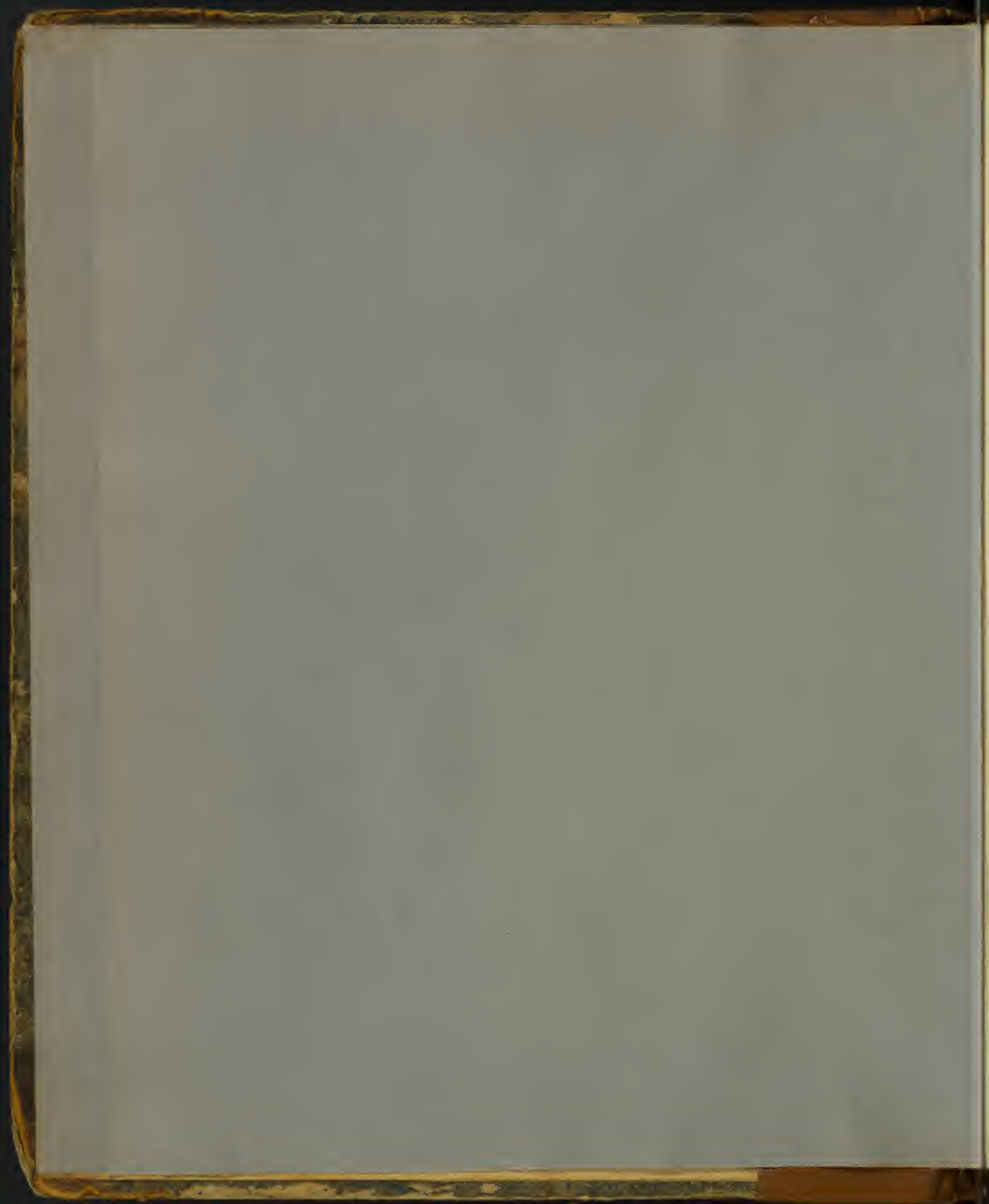


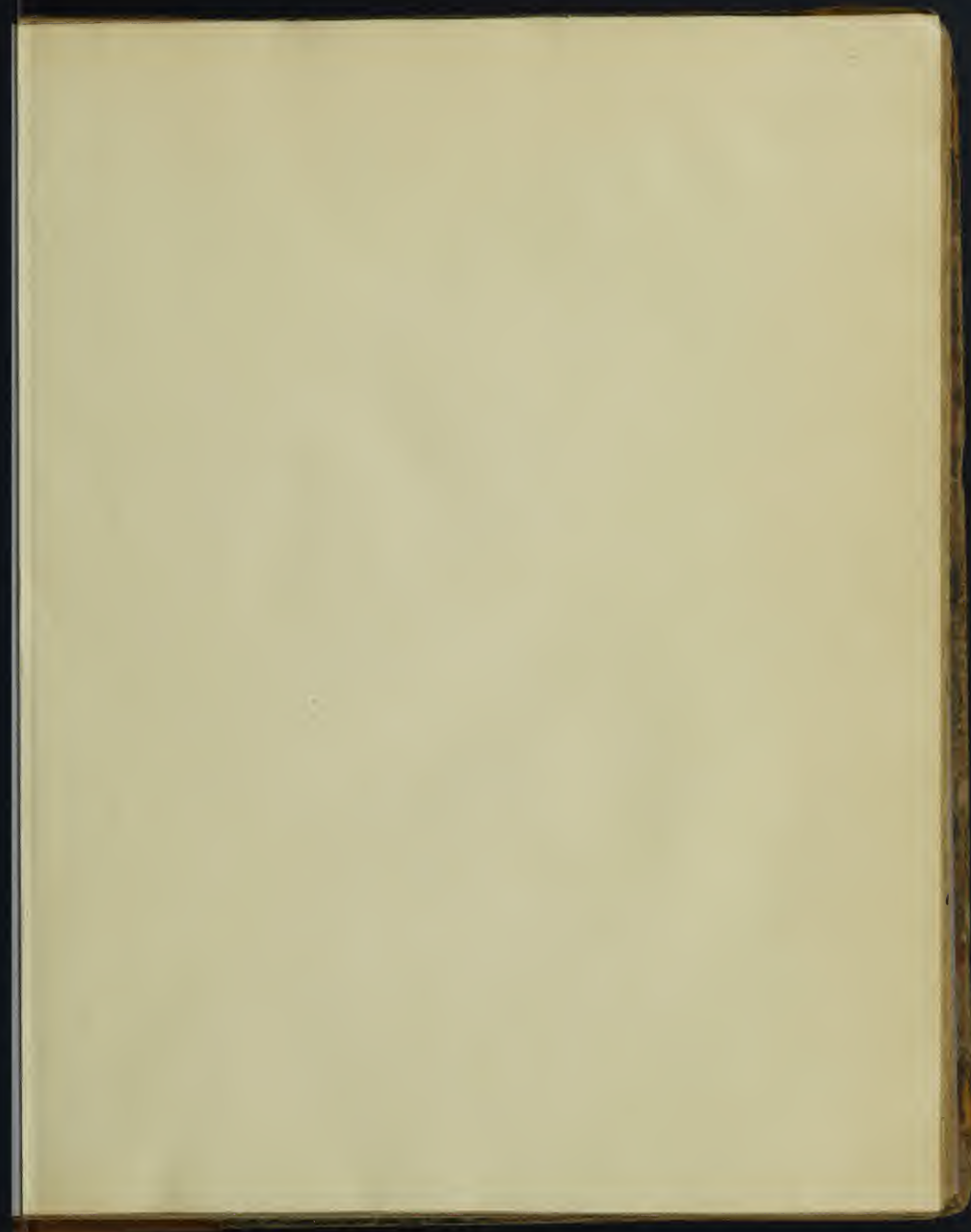
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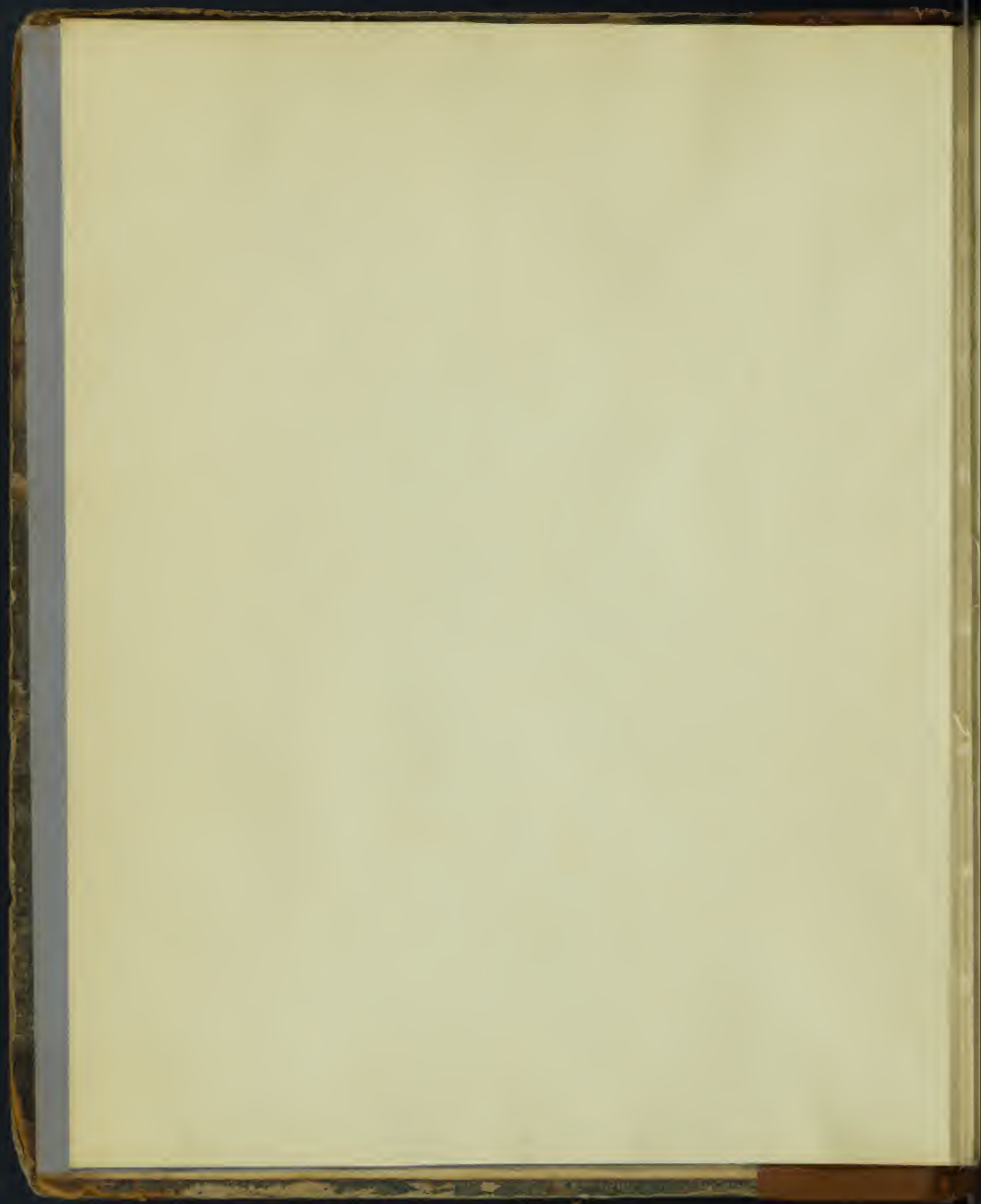


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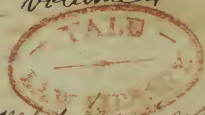




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THESE ARE STACK ROOMS

Real Estate - volume 4



How will you distinguish between real & personal estate?

I have seen no definition of real property that conveys an adequate idea - Some say 'tis immovable - Thus you can't divide it about like cattle - yet some real property is moveable - others say 'tis what goes to the Heir & not to the Ex - This is not true a man may have an estate for life, this is real property. 'Tis greatly true that what a man possesses in land above an estate for life, including that, is real property -

This real property whatever it is is distinguished into corporeal & incorporeal Hereditaments - By corporeal Hereditaments is meant Land & all included or combined in that term.

An incorporeal Hereditament is a right that produces property & ordinarily issues out of a corporeal hereditament

that is Land ? It does not mean land in the usual conception of the term - but it issues also - & all growing upon it, or that is produced from manure, or that is affixed to it, as fences & houses -

The word Land is very extensive in its signification Land is a corporeal Hereditament, & when a man conveys Land, all upon it goes of course -

Real Estate

An incorporeal hereditament is different. Suppose a man has a right of way; that is real estate - But he does not own the soil - only a right to pass over it -

So of a fishery in certain waters - Others - Salts ministerial offices that are granted out for life, in any are incorporeal hereditaments -

I will now take some notice of the word Leis when a man gives an estate to his Leis heir heir what is meant? Plainly, he meant to convey a Fee simple. But his Leis have no estate in it - & in fact even if he has children he has no Leis while living - inasmuch as they have no interest in it - He may dispose of it as he pleases - It only means therefore to describe the quantity of an estate - thus an estate to his Leis, is a conveyance of a Fee simple - & it you add "of his heir" to an estate tail a Fee tail - If a man does not dispose of his property in any manner it will go to his Leis at Law.

Originally a man had power to dispose of his personal property, but not of his land - a Fee simple cannot be obtained unless the Leis heir is used - When the Northern nations broke into the Roman Empire the officers bestowed of the Land as they pleased -

Real Estate



3

But men soon became dissatisfied with this, & then had it for years - & afterwards for life - after this however men wished for lands not only for life but to descend to their children - & this they accomplished by inserting the word heir after Lands became alienable land given to A for an estate only for life, but given to A & B then conveyed to C in fee simple

The import of the word heir under the primitive Feudal only meant issue that descended lineally from his body, i.e. it might go to any body descended from the blood of the first purchaser - Thus it conveyed to B & C desc. to his heir in fee simple & dies with issue now any person lineally descended from B may inherit it - afterwards by a fiction they let in all collateral heirs by considering that land newly purchased as a Feudum antiquum & not a novum Feudum

As to the origin of Feudalism - To show this it is necessary to speak of the Feudal system - When the Northern nations broke into the Roman Empire they had no such ideas as to lands as we have - The right of distributing the Lands were supposed to vest in the leader or principal man of the Horde - He distributed it to his officers, & they to their followers - The interest was wholly at the will of the distributor, & sort of estate at will -

Real Estate -

This was the origin of the oath of allegiance or fealty
 This was taken to the Lord or chief - it was a promise
 to follow him in his wars & attend him in his Courts.
 Now, then an estate at will - But as the time grew
 more peaceable, they wanted a more permanent interest
 so they took short leases - afterwards they gave estates
 for the life of the donor & not per antea vice. This gave
 ideas of property in the soil & not merely in the use as
 before - an estate given to a man & his heirs is an absolute estate.
 They next wanted them to descend to their children
 & in order to effect this, some form was necessary to express
 it - so they introduced heirs - to a man & his heirs - i.e.
 to descend to heirs - yet this was not alienable & yet
 the heirs had no estate till death of the donor, for
 till his death there are no heirs - It was only a
 contract that it should go to his heirs on his death -

But at that time "heirs" included only direct
descendants in infinite not collateral relations.
 It was descendent to every person who was of the
 blood of the ^{first} purchaser - So if Richard is first purchaser
 he has sons John & Peter - now if Richard dies, &
 then John dies, Peter can inherit the estate, for
 he is of the blood of the first purchaser - heirs of
 or Brother of Richard -

Real Estate

But at length a newly purchased estate was allowed by a fiction to be considered as feudum antiquum tho it was in fact a feudum novum i.e. it shall go to any relation lineal or collateral.

But if it is capable of demonstration that it is a feudum patrimonium or feudum maternum it shall never be inherited by relations descending from a different stock —

But these estates were not alienable or devisable the course of this business was very gradual — When the purchase was made & the sword assigna was used, one fourth might be aliened — This was introduced by the Crusades.

Soon after one half might be aliened by usage — Afterwards the whole became alienable if the estate was purchased to him, L. Leis & assigna —

The next ascendible estates were treated in the same manner; first, one fourth &c —

After the Stat. quia emptores 18 Edw. 1. all persons were allowed to alienate their property except Tenants in capite & they might do so by paying fines —

This permission of alienation was a sore thing to the Nobility, for the commons got the money out of their Lands: they endeavoured to prevent it —

They therefore conveyed their estates to some child & the Leis of his body — they thought that this would be in the hands only an estate for life then the next want to his children & so it was considered for a long time —

Real Estate -

But at length the C^t considered the Leis of his body to mean a fee simple conditional, i.e. one which he might alienate as soon as he had issue thus defeated the design - The Nobility then got the Stat. de donis enacted which prohibited such alienations, & caused such estates to descend loggees from generation to generation - There were means then devised to destroy entailments -

If an estate is given to A & his Leis, it's a fee simple; if to A & the Leis of his body it's a fee tail; if the word Leis or Leis is not used, it's an estate for life, if for any certain period, it's an estate for years - if a man holds over after the expiration of the time limited by his title it's an estate by reference; if no time is specified it's an estate at will. These are all the possible kinds of estates. This will all be treated of in their order - at present I shall speak of alienation by Will: First - Leases were made devisable by Stat 31st Hen 8.

Our Saxon ancestors settled in the south of Britain where the Romans had been & the Romans had devised the Saxons learned it from them from the civil Law -

Real Estate

7

after the Norman Conquest this was cut off in all cases except in a few districts which were allowed to retain ancient customs -

But before the Stat. Hen. 8 there was a mode of devising found out - for uses were devised the Lessor could not be - Thus A conveyed lands to B for the use of C - Now C had the beneficial interest - In this case C & his heirs would compel B to let C have the use, & it is this use descended -

This was invented thus - men desired to devise the lands but as they could not do that, they devised the use to religious houses at their death - accordingly a Stat. made all such donations void, since all the lands of the kingdom were like to be swallowed up for the use of religious houses -

However it was next converted to another purpose for, to secure lands against forfeitures in the time of the Civil Wars between the Houses of Lancaster & York, they were conveyed to the use of the grantor - for uses were not a forfeiture -

But the Stat. 27 Hen. 8 enacted that he who lets the use should hold the land, i.e. the Stat. creates the title for the cestui que use or transferee the use to the person - This would have caused a great revolution in devising - for now there was no use to devise, unless to Stat. 32 & 34 Hen. 8 had enacted that lands might be devised

Real Estate —

In deeds certain technical terms are indispensably necessary to create certain estates — So the word Heirs — But in wills the intention is the sole star no technical words are necessary — So to a man & his children forever, conveys in a will a fee simple, but not in a deed — In a deed the intention yields to the technical words — in a will the technical words to the intention —

But there is a qualification to this rule — viz. the intention is to be the guide, provided it is consistent with the rules of Law — But this qualification does not relate to the terms used, but to the kind of estate — For if the intention is clear & the estate attempted to be given is such as one as the Law allows of, it takes effect — Even if he attempts to entail person property, or gives an estate in fee simple but forbids its being alienated, or an estate to him & his heirs male — This is not allowed, for no such estate is known to the Law, tho' there may be one to him & his heirs male of his body — But in a will the words "all my estate" gives a fee simple, if he gives one; — in a deed only an estate for life — So that to him & his heirs in a will creates an entailment; in a deed "heirs of the body" is indispensably necessary to create an entailment — "Heirs" in a deed is used to express the quantity of an estate — in a will it is only a descriptive persona — So "heirs" means the eldest son after he is dead — "heirs of the body" means all those who would be his heirs — The word Heirs means the same as heirs no more — In Deed it means the eldest son & in Law all the children —

Estates in Fee Simple

How created - its qualities - incidents & destiny

Co. Litt. 1.st Heirs forever - But now heirs et vi termini import: perpetuity
suff - This estate is created by will, by any terms that

clearly show an intention to create it -

So all my real estate "passes a fee simple - So all that I am
worth"

Two Qualities, First - It is descendible to the heirs gen^l i.e.
if the holder don't dispose of it, it descends to the heirs gen^l. This
means any person who is related to him, unless restrained by particular
regulations -

2^d It is alienable by deed at pleasure; for heirs are not
concerned - the word is only descriptive persons - they have
no interest -

3^d It is alienable by will at pleasure - He may cut off his heirs
& give it to a stranger. But if in aliening he attempts to
deprive a fee simple of these qualities, the condition is void
as if he give a fee simple forbearing to alienate it - this pro-
hibition is void, & the conveyance absolute - So if he & his male

Co. Litt. 13.

But suppose he don't alienate, & dies with heirs? & then
the estate escheats to the Lord of the manor, or the heir of the
first bestower of it - for in this case the old doctrine of the
lands being held of a superior, operates -

Estates in fee Simple

But in this Country there are no feudal institutions
 even frowns are strictly allodial. Held of no superior -
 So no provision is made, if the blood of the owner be
 absolutely extinct, except that by Stat. (in Con.) by which
 the Justices are ordered to enquire for Heirs &
 if none are found, to sell the land, & put the
 money into the public treasure -

Of the Incidents

- 1st It is liable to dower of the wife & this could not
 be cut off by any means at law. If it was
 aliened or descended to the heir, it went under the incum-
 brance of dower - Indeed by her consent in W. right.
- 2^d It is liable to the Custody of the husband, when the
 estate belongs to the wife -

This fee simple may be had, in land ^{not only} as such
 but it may be had in other real property exclusive of
 the soil & may be conveyed as the soil - Thus if
 wood & timber are granted in fee, receiving the soil
 to the grantor, now the wood & timber are fee simple
 estate & descend to the Heirs just as land would -
 In what cases the word Heirs is necessary to create a
 fee simple - Heir & Heirs are exactly the same.

In case of granting to an aggregate corporation,
 "successors" supplies the place of the word Heirs - So to
 a corporation, "forever" have, a fee for aggregate corporation is implied

Estates in fee Simple & Tail

Again - If A conveys to B & heirs, & B reconveys in as full a manner as A conveyed, a fee passes -
Secur if B conveys to a third person -

Les. Lit. 9. Barreners or Joint tenants may release an estate in fee to Co-tenants & with the word heirs.

Of an Estate Tail - *defined in Rynd by Stat.*

How created, qualities - incidents - & destroy -

Co. Lit. 20. 1st Li. created by only one way, gift to him & heirs of his body - words of procreation are indispensable in a deed - But in a will, any words that show the intention to convey a fee tail, are sufficient -

Qualities - 1st owner can never alien or demise it -
Indeed he may sell his own right by operation of law, but cannot bar the issue -

2^d Li. descendible, not to heirs generally - it must be to heirs of his body - not indeed to the heirs general of his body - tho it may be - & then 'tis an estate tail copious -
But it may be to A & the heirs male of his body, & then no others can take it, not even if the males are extinct.

Co. Litt. 25. here 'tis an estate male tail - So it may be an estate tail female - If 'tis given to A & heirs of his body by his present wife 'tis an estate tail special, of, to him & heirs male of his present wife, 'tis tail male special & affinal -
here it must be observed that the conveyance in order to be good must be conducted wholly thro the solemnities of the gift -

Estates Tail

As to the — If there are no heirs who can take it, it goes back to the grantor — For the fee tail was carved out of a fee simple, the fee remaining in the grantor which descends to the heirs of the grantor who shall take it — The Incidents — The fee tail has a right to do with it as he pleases respecting improvement, may commit waste with impunity & —

Is liable to Dower of the wife & the heirs take it liable to this condition —

Is liable also to Curtesy — It may be carved & turned into a fee simple by fine & recovery of Barredment in Con. The object of it is

to prevent the immediate issue from possessing the estate — of course it cannot be carved — So if it goes to B, the heirs of his body — to an entail B holds it as an entailment — But the moment the grantor dies, it descends to his heirs a fee simple.

Some say the estate in B is only an estate for life & so not subject to Dower or Curtesy — But I answer, the Stat. by ^{which an entailment takes effect in} the case of that term in the Eng. books — So it is an entailed estate — Besides, if it is not, it would follow not the form of the gift, but would go to the heirs good in all instances — But this is not a fact where the estate is for life —

Both these estates are called estates of inheritance because they descend —

Estates, for Life

13

There are conventional & those created by operation or construction of Law - Conventional are sometimes for the life of the grantee & sometimes for the life of another person

If given for life, not mentioning whose, it's considered as for the life of the grantee, it being taken most strongly agt the grantor -

Now conventional estates are created, i.e. by what words - its qualities - incidents & duration -

As to the words - I observe - 1st If for life of the grantee he is to use for his life only - & with the intention is to govern - yet a man gives his farm, i.e. a thing per se, it passes only an estate for life - So if he says my house -

If an estate is given which may last for life, it's considered as an estate for life - So if to a woman during her widowhood, it's an estate for life - or so considered, because she may never be married -

Then an estate is given to a man for the life of another if the grantee dies before the certus quo vivit, what becomes of it? for the grantor shant have it - he has parted with the whole of his interest in it during the life of the certus quo vivit shant go to the Ex^r because it's real property -

Estate for life, by operation of Law

It cannot be created, because it is not a fee simple -
It is then an Landis jacens, open to the first
occupier, while ceasing per me live -

Co. Litt. 41.

Now a Statute made in Eng. which gives power
to the Ex^r to sell & pay the Debts - so that Stat^e
in Com -

of Life Estate by operation of Law -

1st By the Courtesy - this is a Life estate - for it may
last during life - If h. alienes it, it operates no
longer than during coverture. If Co. takes it -
If leased for 100 years - it is good only during the
coverture if he dies first - but if she dies the good
during his life -

of Estate by Dower - an Estate by Dower
is an estate of real property to which the wife is entitled
on the decease of her husband -

The wife has a right to one third of all the real
property of inheritance, of which the husband was at
any time seized during the coverture to hold for her
natural life - provided she could have had issue & that
issue could have inherited by law - not necessary
that she should have had issue -

her right to this estate can never be disposed of
by the husband either by deed or will; nor indeed is it

Estate by Dower —

15

The power of the husband to alien her right & give her any thing in lieu of dower only by her consent - her title is paramount to all others.

Again — It cannot be taken by her creditors. He can't deprive her of it by any agreement during coverture, nor previous to marriage, unless he settles on her a competent jointure —

She is not bound by any jointure settled after marriage — but if she accepts of one it's a bar to dower —

The husband right to his person & property if he chooses to deprive her of it — His creditors or devisees can take it before her — but if he don't alien it one third of it is completely at her disposal — but she has real estate only for life —

Dower is a right that lasts only during her life — if he alienes it under this incumbence — It cannot be taken by exon —

Where a man married a woman above 40 years of age, the law said it was not certain she could not have issue. Where an estate is given to a man & the heirs of his body or his now wife may take together. Now if man dies & he married woman, she can't be endowed of that estate, for her children could not inherit it —

Estates in Dower

The estate must be a fee, either simple or tail -
in order to her being endowed of it -

He must have been seized during the coverture
either in deed or in Law - Seisin in Law is suff^t
for her to recover her Dower -

The seisin must not be instantaneous - as if
A conveys to B on purpose that he shall convey to C
then the wife of B is not to be endowed, for he is a
mere trustee for another person -

On this ground the wives of mortgagees are not
to be endowed - new formally -

To be entitled to Dower a wife must be legally the
a divorce a mensa et thoro does not cut off her Dower -
nay, there is ground for divorce a vinculo matrimonii
yet unless this takes place before his death she shall
be endowed -

In case of a second marriage, the first wife
living, the void is not merely voidable, & of course
the second wife cannot be endowed -

Formerly treason or felony in the husband
destroyed the right of Dower at Com. Law - but by
stat it is not so as to treason & by another it not
now in case of felony -

Estates by Dower

11

The wife of an alien can't be endowed. For an alien can't hold lands. - I query whether the case of the enquiry is not made as to his alienage before his death. - After his death there is no danger of the enemy's being aided. - I also an alien woman can't be endowed, for she can't hold lands, except the queen consort -

The wife of a disseisor shall be endowed (tho her title is liable to be defeated) - For the husband died seized -

The wife of a Joint tenant shall not be endowed for the whole right survives to the survivors -

This Dower is to be set out by the heir with metes & bounds. - If she don't like his proceedings she is to bring a writ of Dower & then it is determined -

If the thing is incapable of partition as a mell then she must take one third of the toll on the lake -

The wife of a cestui que trust, i.e. a trust estate shall not be endowed - This is wrong - For the wife of the terra tenet can't be endowed -

Law in Con. He has a right of Dower in all the lands of which he died seized & not of which he had been seized during coverture. This is the Law of some of the Eastern States. ^{See Dower}
N York Law is the same as the Eng. except that by joining in a conveyance she can have

Estates in Dower

In Eng. the wife is gently induced to sign in Conveyances of Land - Where a man in Lon. in order to cut his wife off from Dower conveyed his land to his children just at the time of his death by Deed - But the Ct considered it as a testamentary disposition, which will not cut off Dower.

To be sure ^{in Con} if he chooses to turn his estate into money & then devise it from her, he can cut her off.

A divorce in Lon. a vinculo matrimonii don't of course prevent Dower, for it may be for supervenient causes -

I presume no conviction of Treason or felony would in Lon. bar Dower - for it don't corrupt the blood -

In Lon. by usage there is no Joint ten^t - They are just like Ten^t in Common -

In New York there can be no Joint tenancy unless it is so expressly declared.

Com Ct of Probate appoints two or three judicious men, who set out the Dower - Here a wife shall be endowed of a trust Estate.

Co. Litt. 304-40

11 Co. 25. Dec. 181.

1 Roll 576. 621.

Estates in Dower

9

How Dower may be barred. The most com. mode is by Jointure, settled upon her before marriage while she is in p^{re}sentis.

The Jointure to her must be expressed to be in lieu of Dower - otherwise it shall be considered as a mere marriage settlement.

Qualities of a good Jointure - It must be of real prop^y, i.e. fee tail, simple, or for life of the wife not person^l prop^y - same in bar. Indeed a lease for 999 yrs is considered here as real prop^y. So of any long lease.

It must be for the life of the wife at least - at Common Law jointure was no bar, unless it was *ad vitam ecclesiasticam* -

It must commence in possession or profit at by rent, immediately after the death of the husband -

It must be a competent livelihood - It is very proper that the Law should thus take care of her interest - for possibly she married young &c - It must be in proportion to her circumstances in life - -

Estates in Dower

May the at the time of the contract, the jointure was ~~insufficient~~, yet if he has grown rich, this must be increased proportionally -

It must be conveyed to her, & not to Trustees for her -

Jointure settled after marriage is not binding if she choose to avoid it - a devise of land to wife don't bar Dower, tho accepted, unless stated to be in lieu of Dower -

But in Com. I suppose that a devise of $\frac{1}{3}$ of all the real estate for the life of the wife, would be construed to be meant in bar of Dower & to have been given thro ignorance of Devisor who supposed she could not take except by devise -

Co. Litt. 35. 4 Co. 1.

1 Atk. 551. 4 Co. 125.

4 Co. 3 - -

If she should be evicted of the Land thus settled she may resort to her Dower again.

Co. Litt. 32.

Dower may be barred by elopement with an Adulterer & also if she goes away alone, & lives with an Adulterer -

She has her dower if the husband becomes reconciled to her afterwards -

If the wife joins in a fine, she is barred -

Estates in Dower

21

In w. l. genly, her joining is sufft. In Eng. her
Moll. 581.
Hous. 15. going into it don't make a difference —

If the joins in conveying Lands that were
given in jointure after marriage, it don't bar her
of Dower at all — for she was not obliged to accept it
at all —

Of Estates by the Curtesy

If a man marries a woman who is seized of an
estate in fee or tail, & has by her issue born alive,
& capable of inheriting the estate, he has a right
to such estate during his life, after her death —

The seizure must be in fact & not in law for
the husband can compel a seizure in fact. whereas
the wife cannot as to her Dower lands —

It must be born alive, yet need not be heard to
cry — other evidence is just as good —

The issue must be born, whereas in case of Dower
there need be no issue born, provided that if issue had
been born it would have been capable of inheriting
it in sufft. So if A marries Mary to whom an estate
is given in special tail & she dies with issue, & he
afterwards marries Susan who has issue, yet he can't
have the curtesy estate in the Lands for Susan's issue can't
inherit it.

Estates by the Curtesy

Curtesy may be had as to the whole estate, but Dower is only $\frac{1}{3}$ part —

3 P. Wms 227. Husband may be test by the Curtesy of a Trust estate tho the wife can't have Dower in it — No reason for this difference in point of principle —

1 alk. 603 — S of Wife's mortgaged premises —

This question might have been made in time the now too late — some lands held under the Charter of Can. D. are held in gavelkind tenure; & in Kent the husband might have curtesy tho he had no issue — but in Eng. by usage we have adopted the cont. Law rule as to curtesy.

3 P. Wms 287. Living in adultery with another woman is no bar of curtesy, as it is of Dower — So also in case he goes off with another woman it is no bar —

1 alk. 607. 2 do 42. 1 Wms. 298. — But he has no right to curtesy, nor any power over an estate when given to her sole & separate use. Of the Incidents to an estate for life — All these estates for life is better by operation of Law or convention — are governed by the same genl principles —

Tenant for life is liable for waste; i.e. he is liable to lose the thing wasted on his estate, & then it goes to the reversioners, with the damages. If waste is committed only in part, he is liable pro tanto —

23

Waste, Emblements &c to Estates for life -

If the waste is committed sparsim, the whole goes because no distinction can be made

If Tenant for life attempts to create a greater estate than he has, he forfeits his right. For it tends to injure the Lord -

But in this County, as there is no danger of injuring the title of the Lord - I doubt if it applies - The reason don't apply

Tenants for life have a right to cut down, felled, & lay lots & the like; i.e. as much as is necessary for the purposes of husbandry - the Lord has a right to timber to repair at times - It depends on the contract however - If no agreement is made about it, it belongs to the lessee, & then he has a right to take timber for that purpose

He must apply the timber in the land; he must not sell or exchange it for better to apply -

Co. Litt. 41-2.

These estates are freehold - many estates less than for life are less than freehold -

Of Emblements - Emblements are those things which are produced annually by labour - not that which is increased by labour as grass & trees, grain & the like are emblements

Emblements

There are sometimes real + sometimes personal --
 If a man conveys land, having crops on it, the
 crops pass with it as real property unless specially reserved
 + this is to be done by deed -- for if by word it's within
 the Stat. of Frauds + requires -- Ignorance of this
 rule has caused frequent injustice --

If land on which are emblements at the time
 of the devise, is devised, they pass as real property to the
 devisee -- for the Devisee intended the Land should go --

If emblements are taken animo furandi
 'tis only Trespass & not Theft -- So if he takes corn
 growing 'tis only Trespass -- but if he take corn that
 is gathered 'tis Theft -- In the former case he invades
 real property + in the latter person's property.

But if a man dies witht^r having devised his
 property, the emblements go to the Ex^r + not to the
Heir; for here they are person's property --

If Land has emblements at the time of the death
 of the devisee, but had none at the time of the devise made
 the Ex^r takes the emblements for the intention is to be pursued

If the same emblements are not on the land at the time of
 the death of the devisee as at the time of the devise made, there
 is an ademption of the legacy --

Emblements & Maxims —

If the Tenant puts an end to his estate by his own act, he shall not have the emblements, — because if the reversioner terminates it. — If the act of God terminates his estate, he shall have the emblements for actus dei nemini facit injuriam — Besides this to encourage husbandry —

If a woman hold an estate during her widowhood, — and, if she marries she loses the emblements. — If a lease know the exact time his lease expires, & then sows a crop not matured till after that time, he loses the emblements. — If however the land is let to an under lease, & then the first tenant determines the estate by his own act, the under lease shall not lose the emblements for he is not to blame —

I will now explain some Maxims — 1st An estate of freehold shall not be created to commence in future; i.e. it must ^{not} be instantaneous of its creation or not at all — A freehold was proved by corporal tradition of lands in presence of witnesses, & the evidence of the title was reposed in their memories — now as it would be difficult for them to remember how many months forward the estate was to commence, it was determined that it should commence at once or not at all — By this maxim it meant not that the grantee must take the right of enjoyment

Maxims -

But that the grantor must then part with his interest

So it may grant to B an estate for life or years & the remainder to C in fee - so the reversion is transferred to the remainderman in present & the right of enjoyment is postponed -

But this maxim is sometimes dispensed with - By a devise an estate may be created to commence in future yet not so as to create a perpetuity - It must be given to vest in the life of a person who is now living & in the mean time, it descends to the heirs -

It may also extend to 21 years after the death of a person now in being: for it may be to A & his heirs who may be born at his death - And it may go further & vest 21 years 29 months after his death - for the son may be born 9 months after his death -

I think our Stat by implication destroys this maxim - It says all estates by Deed or will given to any person in being or any immediate descendant of him is good & no other is good - So it may be the youngest child in town or eldest - Another maxim is, the freehold must not be in abeyance - i.e. the freehold must be vested in somebody - Thus if A gives an estate to B

Maxims

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the freehold is still in A. But if he limits over and
Remains to C, the freehold is in C.

Suppose an estate given to B for life, remainder
over to his eldest son he having no son yet. This is
a good contingent remainder; for if he has a son tomorrow.

But to support a contingent remainder the particular
~~estate~~ & prior estate must be a freehold one. For as
the freehold issues out of the grantor it must rest in
the particular tenant otherwise it will be in abeyance
or looking out for some person in whom to rest
& this the Law allows as the old philosophers did a vacuum to

So an estate to A for years, Remainder over to the
sonborn son of B is bad.

Another maxim was, a fee simple is not to be
limited after or on a fee simple - As to A & his heirs
& for want thereof to B & his heirs - this is bad - for he
gives the whole to A & his heirs, & so has nothing to limit over.

This is now the rule in deeds - But in wills
this rule is dispensed with - So an estate may be limited
to rest on a contingency that is to happen in a life or
lives in being - so to A & his heirs; provided he dies with heirs
in the life of B, then to B & his heirs, this is good. This estate
is not alienable - so it is not a fee simple, but a new kind of estate created
under wills - It is really an executory devise, much like an entailment.

Wright. 289.
Co. Litt. 18.

no. Lec 541.
Wright. 270.

Maxims -

But what is meant by "a man dying with issue"?
 It means an indefinite failure of issue at any time -
 So if to A & heirs & provided he die with issue, to B in fee.
 Now some say it means, if his issue ever fails at any
 extent of time after his death - But again tis said
 the contingency is too remote - This doctrine is absurd
 for according to this a man might be said to have
 died with issue & then again not to have died with issue.
 & 100 years after his death he might be said to have
 died without issue - So accordingly, where they can lay
 hold of any circumstances that show that dying with
 children was meant, will do it to give effect
 to the devise - But if tis merely to if & his issue
 it goes on indefinitely -

If an estate is given to A for life, Remains
 to his heirs - This shall be a fee simple estate in
 A the estate for life living void - the word heirs make
 a fee simple - now it has been strongly contended
 that if any other words are used to express an estate
 for life besides "estate for life" then he shall take an
 estate for life - others say the word heirs always
 make a fee simple

Maxims 2

28

ordinarily the word Leis is not a word of description
Plow. 343. but expresses the quantity of estate given -

So if to A for Life & on his death to B & heirs
Plow. 93. now if B die before A, B's heirs can't take -
4th ed. last

In a will, I don't see that giving an estate
Reo. 66. for life can mean any greater estate than that

of those estates in real things which do not
amount to real estates -

if Estates for years - This is personal property
it goes to the Ex'rs & may be sold like other personal property
However long the term yet in Eng. it is always
personal property -

In Com long terms are considered as real property

This estate must be created by an instrument in
writing - By Stat. of Transfers. In Eng. a lease for three
years is excepted in Com. no such exception -

Formerly at Com. Law a lease might be by
2 Wils. 20 & 49. parol -

It must be for a certain term or by reference
to something that will render it certain - It must
have a certain beginning & a certain end -
depending on no contingency - If there be a contingency
& such that it may not happen for life, it is a fee
estate. If the contingency is of a different nature from this -

Estates for Years

The lease creates no estate at all —

It given as long as time shall last his fee simple
in a will. seems in a deed —

an estate for three months is an estate for
years; for it has a certain beginning & end —

It may be created to commence in future, for no
freehold is conveyed — The usual words are "lease
& demise". No technical words however are necessary
So a covenant that he shall enjoy it is suffice —

If the lease give no time for its commencement
the date of the execution of it is the time, or if its
delivery is made afterwards that ascertains the date.

That in fee can lease for any length of time.

Ten^t in tail can lease only for his own life —

If the lease be for twenty years, his death previous
to that time would destroy the estate — So it may last
for life — yet his an estate for years for there
is a time beyond which it cannot last —

By a Stat in Eng. an estate for three lives
or 21 yrs may be created by ten^t in tail —

But for life may lease just as Ten^t in tail

Bro. Com. 207

Bro. Dec. 92.

Co. Lit. 45

Moore 181 n/84

Book 38.

Estates for Years -

31

Nov. 1807
or 1802.

Yen^r for years may make a sub. lease or assign his own - but he is in the same predicament as supra -

If a lease is made to A for three years & afterwards to B for a certain term; now if A forfeits his estate before the three years have elapsed B's estate commences immediately on the determination of A's -

A man may make a lease to commence on the day of his death -

There has been some dispute when a lease commences, when it says from the date or the day of the date - A lease to commence from the day of the date, will be considered inclusive or exclusive of the day of the date, according as it will give effect or make void the instrument or the intention of the lessor -

A lease to commence from the date, begins at the moment of the date - Now if freehold estate given to commence from the day of the date a good estate? For it is said that he a freehold to commence in futuro - La Man^r considers all the cases in Camp 714 or 114 - most clearly it is a good estate - For the person creating it undoubtedly intended it to commence from the time of making the deed - Indeed it should from the day of the date, exactly by agreement with "from the date"

Estates for years.

The time of the commencement may be a past as well as a present or future time, provided the time of ending be fixed—

A lease may be good by reference to something certain for ad certum vel quod certum reddi potest.

Co. 35.

So for as many years as L shall say, is good provided L names it 'tis reduced to certainty—

So for as many years as L leased for, or as long as the lease which L holds—

2 Burr. 1023.

But a lease for as many years as L should say, seems now to be within the Stat. of Frauds, for the time does appear in the instrument.

Moore 392.

If L leases to B for one year, & so on from year to year—this is good for two years—

6 Co. 35.—

But a lease for so many years as B shall live is void—as a lease for years.

So a lease till L's death is recovered of the profits is no lease at all, on account of its uncertainty—

On the reception of a lease, the estate commences immediately with an entry—So L may convey before entry—So B is bound to pay rent—This estate is called L's interest—

Estates for years

This sort for years is liable for waste & to forfeiture, & is entitled to estovers to repair, unless there is a covenant on the part of the lessee to do it -

Formerly it was held that a life estate could never be created by a term for years, because it was considered as greater than an estate for years - This is so now in Law - But in Wills, i.e. devises - the rule is otherwise for term for years may devise a life estate - However the first idea was that he could not create more than one life estate -

But the rule is now that he may create as many life estates as he pleases, provided all the devises are in being at the time -

A term for years cannot be entailed - of course if a man does attempt to entail it, the first donee takes all - So to it the heir of his body -

Now tho the policy of the Law would allow entailment why may he not create something out of it - since a life estate might be limited over after a life estate - Why not allow donee to take a life estate & then his heir take the whole estate, there is no danger in this & it would be giving effect to the intention of the Testator as far as possible - That question *supra* is now settled in Eng.

Estates for years & at Will —

What is entailing an inheritance? When a man in making provision for his family by deed or will gives a lease to a younger child which is to cease on its receiving a sum of money from the heir, then the estate descends to the heir who then takes by descent — This is entailing an inheritance it is a method of raising a portion, or of providing for younger children —

If B wants to give an estate to A for life, remainder over to his son; now if this estate is surrendered up before a son is born, the contingent remainder is destroyed — But to prevent this effect, Trustees are appointed in the deed to preserve the contingent remainder — in whom it will vest immediately on A's estate ceasing, & continue till A's death — "To A & the heirs of his body in strict settlement" means to A & the eldest son & his issue & on failure of these, to the next eldest son & issue & so on.

Estates at Will — These are dissolvable at pleasure of either party — no writing necessary. While the tenant holds the estate, he is bound to pay rent —

It may be terminated by express words of the Lessor, or by his exercising acts of ownership which are inconsistent with the Tenant's right —

Co. Litt. c. 5

Co. Litt. 59.
Roll. 800.
Went. 247.

Estates at Will -

35

But the Lessor may not invade the emblements, as by reaping - This is Trespass - Tho it would determine the estate.

Lesse too may lease when L. pleases, but must pay rent for the time which L. staid - So if he commit waste, he determines the estate, tho L. is not liable in an action of Waste -

Wole 880.
Co. Litt. 57.
Cao. Elin. 880.

Either party may determine the estate - the consequence of this determination, either by Lessor's exercising acts of ownership, or by Lessee's doing it which would be waste in other places the Lessee is not in a situation that he is ever afterwards a trespasser while he remains on the Land -

The moment the estate is at an end, he becomes a trespasser - However he has his rights there of ingress egress &c - He may have acquired a right to the emblements & if so may sue any one who invades them -

Lessor may consider Les's staying either as a detainer or as a Trespass & may bring an act accordingly - of course L. may have an act of ejectment if L. pleases -

By Stat. in Cap. 1 W. 1. he may assent a Freehold Co if he retains or forcibly enters. If a man forcibly enters on another's Land, he may use all necessary means to drive him off - & if he gets killed to his own fault.

Back 413-44.

Estates at Will & Sufferance

If all goes on peaceable, he is bound to pay rent according to contract - & if Lessee determines the estate he is not ejected from the rent - even if Lessee determines it before the year is ended - because it is his own fault - & no apportionment of the rent can be made - If the Lessee cuts timber trees, 'tis not waste, but trespass - No man can be a Trespasser who has possession till that possession is determined -

Co. Lid. 54

A lease for years by parol is tant as will. This is no trespass - The lease is only a license & his good evidence - There has been a great question made in Eng. respecting reserved rent, when he could recover a quantum meruit. In late decisions this question is at an end, & Lessee may show his license to enter & his lease is used to show the quantum meruit. This is presumptive evidence & the best that can be obtained - but it may be rebutted -

Estates at sufferance; differ nothing from those at will, only that one is an implied & the other an express permission -

An estate at sufferance is where one comes into possession by lawful title & holds over after his title has expired - He is bound to pay rent according to contract -

I will now make some observations unconnected, on some things omitted in their proper place -

I have said that a freehold could not be in abeyance, but the fee may be in abeyance - then an estate is given to it for life & remainder to his heirs - here the freehold vests in it & the fee in his heirs -

Co. Litt. 27
2 H. 125.
That we said after possibility of issue extinct is where one is tenant in special tail & a person from whose body the issue was to spring dies without issue or having issue it becomes extinct this is an estate for life subject to all the incidents of life estates; except he is not liable for waste & the thing wasted or cut goes to the reversioner -

one thing respecting Dower - By Stat. if she commits waste, she is liable to lose it - no provision is made for actual waste, only for damages - She may cut timber, still by usage & practice in law. she is not sued in an act of waste, but is liable to the heir in an act of trespass to recover damages. He don't recover the thing wasted - or, to permissive waste, one can't suffer an act to be done to recover the thing wasted - If tenant in Dower don't repair, he may, & then take process & demand - He usually takes some part of the farm - he repairs what is necessary & this must be determined by an act if there be dispute about it - all this by Stat.

How a day is freighted by the month, it is a calendar month, it is a lunar month. Park. R. 181.
x 3 Burr 1455. Dick. 428.
6 Co. 61 -

By months in contracts is understood as from Sun, Lunar months - In mercantile law, solar months - This is settled Law of our own law for a month is four weeks - The original idea on this subject was I believe that it meant 28 working days - In Eng. terms for years are reckoned by length don't alter it - In law we treat them as for years - have power that by the Statute, have made it a conveyance & have admitted that for years are years - In Eng. they can't make the wife, to have property & don't consider the reversioner any thing - our act, affirms the estate is a matter of great convenience - These species of estates may be conditional & liable to be defeated by that provision - These conditions may be precedent or subsequent - as an estate given to B for life provided one wife & the man's third in country remains & afterwards & else -

Co. Litt. 215.

Estates upon Condition

an estate in fee may be created & yet be under some incumbrance all the lands in Pennsylvania held under Chas. & mortgaged to York are so - Thus a man may create a fee & reserve an annual rent to himself & heirs, but the owner of the fee may sell or devise it when & as he pleases, yet it goes under this incumbrance & this quit rent must be paid - if sold to A & his heirs forever receiving \$20 annual ~~rent~~, & provided he not permanently lose, shall have a right to recede. This provision must be made in the deed - This incumbrance may be made & if the condition is not observed or is defeated - or if he chooses to pay a certain stipulated sum - He shall be released the quit rent

Of Estates upon Condition.

I will now consider the distinction between a condition annexed to an estate & a limitation of that estate.

When an estate is so expressly confined & limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail - this is denominated a limitation - as when land is granted to a man so long as he is person of full age, or while he remains unmarried - In such case the estate determines as soon as the condition happens, viz. when he ceases to be person of full age, or the next subsequent estate which depends upon such determination becomes immediately vested witht any act to be done by him who is next in office - tancy.

But when a condition between the grantor & grantee is annexed to an estate & that condition is broken, the law presumes it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition & make either an entry, or a claim in order to avoid the estate. yet the strict words of condition be used in the creation of the estate, if on breach of the condition, the estate be limited over to a 3^d person & does not immediately revert to the grantor or his heirs, then the law construes a Limitation & not a Condition.

Estates upon Condition -

39.

There is an universal rule, that if the terms added are such as denote time, this is a limitation. sover for a condition - a grant to B & his heirs an estate while L continues unmarried this is a limitation. But if words, a grant by A to B & his heirs, if never so that B continues unmarried - Now what is the difference? none in sense - But what is it in Law? This is one case L is a proviso for staying, & in the other not -

a grant to B an estate so long as he continues parson of such a parish - This is a limitation by reason of the word "so long" denoting time. But if such an estate is given to B to be defeated upon L's paying 100 to a condition & if he don't pay it, it continues -

In case of a limitation the estate terminates upon the happening of the contingency. but in case of a condition it continues, if grantor or his representatives don't take advantage of the breach of the condition to enter or claim & so avoid the estate -

Suppose an estate granted by A to B on condition that within two years B enter into with C, & on failure thereof, then to B & his heirs - This the Law construes to be a limitation & not a condition, because if it were a condition upon the breach thereof only A or his representatives could avoid the estate by entry, & so B's remainder might be defeated by their neglecting to enter, just when it is a limitation the estate of B determines & that of C commences, & he may enter upon the lands the instant that the failure happen -

These express conditions annexed may be of such a nature as take of themselves void with reference to any thing else - still the grant itself may be good -

10 Co. 41.
1 Vent. 202.
2 Bro. P.C. 205.
1 Roll. 411.
Co. Litt. 42.

Estates upon Condition

Thus if the conditions at the time of their creation are impossible to be performed or afterwards become impossible by the act of God, the grant being made it vests, the grantee not being to blame — or if the grantor himself defeats it by his own act; or if the condition is, to be defeated if grantee do an unlawful act, it vests in order to remove the temptation; or if the condition is repugnant to the nature of the estate the conditions are void —

Co. Litt. 206-

In any of which cases, if they be conditions subsequent - i.e. to be performed after the estate is vested, the estate shall become absolute in the Ten^t. But if the condition be precedent - i.e. to be performed before the estate vests, as a grant to a man that if he kills another he shall have an estate in fee - here the void condition being precedent, the estate which depends thereon is also void & the grantee shall take nothing by the grant for he has no estate, until the condition be performed —

Reversion

41.
32

956.109 It seems then that a contingent reversion (or one to commence on the determination of a base fee) is not transferable.

There may be at Common Law a contingent Reversion - I know however of only one instance, viz. A conveys to B & heirs a base or qualified fee, while they continue Tenant in the manner of Sale - This is defeasible by their ceasing to be Tenants of the manner of Sale - It may or may not be an estate in fee

246.110 The residuary interest is contingent till the event happens - afterwards it is vested -

Such contingent reversion cannot be conveyed by Deed, for there is no present interest - may however be conveyed by estoppel I suppose - Indeed there can be no attornment in this case -

As a Reversion is created by act of Law only it follows that if a man grant an estate for years, life or with remainder to him self in fee he voids his grant, for what he thus limits to himself as a remainder is a reversion. The old estate never passed out of him - This is a remainder not a reversion for the Law continues the old estate in him of course. He is allowed as for a Limit to except himself.

246.176
246.178.
Cor. 8. 321
2 Lev. 400-y

REVERSION

2 Nov. 1776.

On the other hand if one should grant an estate to A for life & reserving rent with reversion to B & heirs this is not a reversion, but takes effect as a Remainder - because he created by the act of the parties - his own improper use of the word reversion -

Co. Litt. 143

2 Pl. 174-6.

When rent is reserved on a lease it is incident to the reversion - So that by a gen^l grant of the reversion the rent will pass - ex. gr. I convey a reversion to B - now the rent is due to B -

But rent is not inseparably incident to the reversion - For there may be a special provision to the contrary - & by it the rent may be granted with the reversion & the reversion with the rent - ex. gr. The rent may be granted for 10 years & after that it is due to the grantor -

Co. Litt. 152

2 Pl. 176.

But tho the rent will follow a gen^l grant of the reversion yet the converse is not true - i.e. by a gen^l grant of the rent, the reversion will not pass. The incident follows the principal - And not the principal the incident - For accessorium non dicit sed sequitur decum principale -

Reversion

43

It is a rule of com. law that a person cannot convey the reversion till the conveyance. This arises from the necessity of attornment. For the Lord could not alien his regnory without the consent of his tenant & vice versa, which is called attornment. This doctrine

Lit. sec 587

Co. Litt 282 of attornment by 4 & 5 Ann. & 11 Geo. 2 has ceased - Co

2 Wood 177-4 I think the rule does not obtain now in Eng. in Br. I think Co. Litt 316-6

2 Bl. 74. 288-90. doctrine is unknown & so I suppose no necessity for it now -

2 W. 174. 288. Attornment is deemed done by feudal principles -

The Reversion may pass under any words that are descriptive of the interest so that the intention is intelligible. If a conveyance of one's land is made

10 Geo. 1072

How. 499.

2 Wood. 174

the reversion passes if he had no other interest - Reversion is the most proper word - even before

the Stat of Grants a freehold vested, reversion could pass by a mere deed & attornment or by fine & recovery for no livery of seisin can be made of it, it being an expectancy - but a vested reversion for years might

2 Wood. 174-5

Lit. sec 587

Park. xx. 81.

How. 149.

be passed with deed - There must however be some memorandum agreeably to Stat. Grants - There may be a reversion of a chattel interest -

Reversion

A Devise of a reversion was always good without attornment as a devise of an estate in houses is without livery -

2 Wood 174.

Perk. 2057.

The reason is, to require attornment would defeat the devise - & it applies only in the case of a grant

As a reversion may be conveyed entire, so it may be subdivided & then conveyed - A particular estate may be granted out of it, & still there may be a residuary interest in the grantor - ex gr. Reversioner grants an estate to B for 10 years & to C for 10 yrs.

2 Wood 174-5

from and after the interest of B ceases, i.e. to commence from the expiration of the subsisting particular estate. -

2 Wood 175.

3 Lev. 156-5.

There may be a reversion of a chattel real ex gr. Lessee for 50 yrs leases for 20 yrs.

The reversion expectant on the determination of the fee tail is so remote that the Law for many purposes regards it as of no value whatever.

Another reason is the estate can always be docked & usually will be, i.e. the reversion is in the power of the tenant in tail. So for the purpose of assets - the heir can never be subjected on the covenant of the ancestor on the ground of his having acted by descent, provided he has nothing but this reversionary interest -

For. 469.

30, 112-235

not correct

Expectancies

45

This is a general rule that if a greater & a lesser estate meet in the same person without any intervening estate, the less is annihilated or merged in the greater as if the fee descend or is purchased by the tenant for years, the estate for years ceases - the better & greater interest absorbs the other - This rule proceeds on the ground that the union of the two interests is a virtual surrender of the particular

2 Pl. 178 estate to the reversioner - If the Law did not
Cro. B. 302 merge the less estate he could not surrender
3 Lev. 437. to himself - i.e. make a contract with himself -

To cause a merger the estate must meet in one & the same right in the same person - So if he have a fee in his own right & a term for years as Det the term for years continues & this is right for if a merger took place the term would be no asset & thus creditors would be injured -

2 Pl. 177 To also if reversioner in fee holds the particular
Cro. B. 276 estate in the right of his wife, there is no merger
Plow. 418. if there were her interest would be lost.
Co. Litt. 398.

But if an estate tail & reversion in fee should meet in the same person & same right there would be no merger, for no actual surrender could be made by tenant in tail, or better, the estate except by fine &c. so the Law will not allow a constructive one

Expectancies

2 Bl. 177-8

2 Geo. 61.

8 Geo. 74

Geo. 3. 302.

In and the Interest of third persons concerned, who take per formam doni & cannot be stripped of their interest without a fine or a writ, are difficult conveyances to make - of course the interest is such as there is some chance of enjoying

Injuries to things Real - of these I propose here to treat of three only viz -

Trespass contra Waste -

I of Trespass to things Real

Trespass in its most extensive sense means any transgression of Law. But in the more limited sense it means any forcible injury done to the Person or property of another -

3 Pl. 204.

Comm. 2. Chap. 12.

But as I shall here consider it, it signifies the entering on another's Land, Tenement & Hereditaments with lawful authority & doing some damage -

3 Pl. 207-10

Coh. D. 380.

Fitzh. A. B. 87-8.

2 Inst. 74

Every unwarrantable entry on another's Land is a Trespass & is called 'Tresp. by breaking his close' - every such entry implies some damage, as at least trespassing down the Highway even tho the snow is on the ground

So proof of entry is sufficient - So far as he is in

Trespass to things Real

47

However he violates the right of the lawful owner
It is necessary the entry should be unlawful or
unwarrantable for in certain circumstances an entry
on another Land is allowed by Law without license from
the owner - e.g. Officer may enter on Land to serve
a legal process - tho he may not break the mansion
house for this purpose -

So also if Debtor owes money which is to be paid
on the land, or he demand money on the land,
he may enter to make payment or tender - the
contract amounts to a license, tho the Law is said
to grant the license, as if there is a contract to pay
rent at a certain place -

So also he is lawful to enter on Lands of another
to take distress, when a person has a right to distress
e.g. a claim of distress if default of payment
of rent -

So also Reversioner may enter to see whether
waste is committed, for if committed there is a forfeiture
of the thing wasted -

So also a traveller has a right to enter on
common Law - The Law gives the license. Indeed opening
our Inn is an implied contract with the public to allow our entry

3 H. 2^d

8 Geo. 1st

Exp. D. 380

Trespass to things Real -

to 20. 40. If A leases Land to B excepting trees, A may enter to take away or dispose of the trees -

So also one may possibly enter on the land of B or of another for the purpose of destroying ravenous beasts 2 Bult. 52.

This is grounded on great expediency - scilicet with anim. 2. Hark. 2. 2. 2. Hark. other animals.
 17 C. 394. —

And in this case the person pursuing in a mod-
 est ad-libitum for then a lasting damage might
 be done -

5 Bult. 180. Talk 450. But this authority don't extend to animals not
 2 Bult. 51. — ravenous as a hare - no principle of policy requires it -

It is laid down in the Books that if A starts
 a hare on his own land, he may pursue him
 on to another's land. This is questionable on principle
 I know use in practice go on another's lands to
 kill any & every animal - why should we have the
 Talk 450
 11 mod 457
 this book is of little authority
 right since policy don't require it -

If an animal fera naturalis is started on my land
 & killed there it is mine; secus if driven on to another's
 ground & killed there - it is then the Landowner's -
 Exp. 404 Talk 450.

3 Bult. 212.
 G.L. C 253
 1 H. Bl. 51.
 Said that the poor have a right to enter on lands
 to glean after harvest is removed - this is now settled
 not to be Law - in 1 Bult. Exp. 413.

Trespass to things Real -

But in regard to them & similar cases where the Law gives a license, any subsequent unlawful use of the authority to given makes the party a trespasser ab initio: For tis said the legal presumption arising from the subsequent act is that he entered originally for the purpose of committing the unlawful act. This is

not the true reason: For it would apply also in case of a License given by the party: but in such a case he is not a Trespasser ab initio.

Thus suppose a Traveller having entered a Tavern should steal, he becomes a Trespasser ab initio by relation

To also if a Landlord having distrained for rent, kills the distress, or wastes it, he is a trespasser for entering the Land or for taking it in the street - & here if justification is pleaded, the P^lff may make a novel assignment of the subsequent trespass: this is negot

But in q^uestⁿ we have non-jeasance or neglect can't make one a Trespasser ab initio by relation - a mere neglect or omission is not itself a Trespass: I think the subsequent act must be a trespass itself independant of the license in order to make the person entering a Trespasser ab initio.

Donch. L. 47.
3 Pl. 213.
Exp. D. 3813.
lev. D. 147.
1702. 12
8 Co. 146.
5 Bae. 111.

Trespass to things, Real

The wrong then must be a voluntary act, misfeasance
 Exp. 383. to make one a Trespasser ab initio.

So if a traveller after entering a Tavern
 8 Geo 116-7. refuses to pay for his entertainment, this is a non-
 30 Bl. 213. -feasance, or breach of contract, & don't make him
 5 Brac. 107-2. a Trespasser ab initio.

So also if a distributor of goods should refuse to
 deliver the articles on payment of rent or on
 tender of an amount before impounding this is a
 5 Brac. 102. nonfeasance -- Tenus if he should work them
Remedy is case.

But this last genl rule as to misfeasance
 admits of one exception in the case of a Shuff
 who having made an arrest on mesne process
 omits to make return of the writ -- not final
 process, for the Deftn has no interest in that
 the Plt has -- In case of mesne process he is
 interested, for he is bound to make return --
 So if he omits to make return he is a Trespasser
ab initio.

Reason of this exception is unless mesne
 process is returned after it's returnable, it's
 not admissible in evidence -- ex. gr. arrest

Trespass to things Real

51.

made to day with returnable next Monday - is not returned - Still he offers it in evidence in a suit for false imprisonment - Now he can't justify till he returns it is a consummating act - He must plead matter of record in justification - but till returned it is not matter of record - vide "False Imprisonment"

Rep. 412.
Coop. 20.
5 Mac. 152.
D.R. 632.
5 Co. 90.
Talk. 809.
4 Co. 67.
1 Wils. 171.

I think there is still another reason that operates in this case tho the last is suff - I suspect this is true, whenever one acting under licence of Law is bound to do some future act by way of consummating or completing what he has begun, the omission of that relation or future act will make him a trespasser by relation ab initio.

The principle I take to be this that where a man has begun an incipient act & neglects to do the consummating act to give it effect, it is incon-
-sistent for him to say that he acts under Law - He abandons the right which the Law gives him, he is a trespasser by relation - I know of no case of this kind - So if Lavinia distressed he should fail to impound he would be a trespasser ab initio -

Trespass to things Real -

Co. Litt. 142-B

3 Geo. 146.

But when one enters on the land of another under a license in fact from the owner, or subsequent abuse of the authority don't make him a trespasser ab initio. ex gr. I direct a person who knocks on my door to come in, & h. afterwards commits a Tresp. I can't sue for an unlawful entry I may indeed sue for the Tresp. But if I should sue for the entry I should fail entirely - for a justification of the entry covers the whole grievance the rest being matter of aggravation -

The reason is, where the Law gives a power in relation to the right of another it will protect the latter ag^t any abuse of that right. But where the party gives consent, he takes the risk of his doing a wrong so far as respects the original act done by his permission. He should in his contract have annexed the limitation expressly which the

5 Bac. 162-B.

for the reason

Law in the case above annexes implicitly in giving his license. He indeed has his remedy for the subsequent act - inde actio de tort. pro inj. & dam. & p. & c.

Said in the Books that to constitute Trespass the act causing the injury must be voluntary - for if done involuntarily & without fault no act lies -

Trespass to things Real -

Exp. D. 383. This is incorrect as a general proposition. The deed
 5 Bac. 185. is so far from being a general rule in any sense,
 Str. 85. that the reverse is always or untrue -

I think this rule is never true where the
 act complained of is in fact committed by the
 Defor himself - & yet it seems to be laid down to
 apply to this case alone - the intent in Tresp.
 is not regarded for civil purposes - To be sure

in criminal cases the maxim is "nemo pro reo
 5 Bac. 179-180

Doug. 649. quis in se non" Lunatics, Drunks & Infants.
 Litch. 110-119.

Q. B. R. 396. are liable civiliter in Tresp. So also if a man

Just. 134 raises a case in self defence & hits one behind

Exp. 399. him, he is a Trespasser - Malice may aggravate

1 Con. 81.

R² 486 damages - but don't affect the issue - & any
 rule it cannot be true, that the wrong must be voluntary -

It is equally true that mistake, or accident, not
 inevitable will not excuse in cases of Trespass -

So if any man breaks another door thinking it his

5 Con. D.

Tresp. C. 1.

own, he is a Trespasser & liable civiliter

"act of assault & battery"

Exp. 383.

3 Lev. 37.

Con. 11 ante is a Trespasser -

So if a person should strike a servant in
 his house thinking it was a burglar - He

Trespass to things Real -

The rule then applies only in cases where the act complained of, is only constructively the act of the Defor. - *ex gr.* Defor's dog chased P's cattle on his own ground - He had a right to let him on & then tis his nature to pursue them - therefore as he did not intend it he was not Defor's liable. The act here is that of the Defor. only constructively & not in fact - Even if he does use due diligence to call him off - for then the act of the dog is that of the master, the dog being a mere instrument - an act can never be the Defor's constructively unless his mind concurs - So if a dog goes voluntarily & kills a deer. tis not his act - Even when he shoots a gun & kills even by accident.

Li. Bann 2092.
 Popl. 181. Case 19.
 110-19. C. 1. 583.

The same rule applies in case of an act done by a servant - Intention then is of importance to show whether tis master's act or not - Tis not his act if not procured by him -

Exp. 402
 Com. D. 402.
 Th. 646.
 4 D.R. 533.

The acts of Defor. for an injury done to things real, will not lie if subject's land is in a foreign country - the reason is, if the subject's local the actor's local & judgment operates in rem.

Trespass to things Real -

Transitory actions may be brought any where

This act when brought for an injury done to land is called Tresp. quare clausum fregit taken from the words of the writ in the register

The word clausum in Ans. is enclosed -

Com. D. Hen. 3. 1.

Lib. 1. B. 8. 7. 8.

3 Pl. 209.

If the act is for an injury to Off's House it is called quare dominum Regit -

Thus far of the gen^r nature & incidents, next of Particular Divisions -

1st Who may maintain this act. It is a gen^r rule that no person can maintain this action except him who has the actual possessⁿ at the time

Cap. 383. 404 of the injury done - To remain^t man & Reversioner Com. D. Hen. 3. 1. 3.

5 Pl. 158. 7. 7. 9. and maintain it during possessⁿ of particular Ten^t

3 Lev. 209.

Lut. 263

2 Bul. 268

4 Leon 144

Reason is this act is bestowed as a Remedy for an injury to the possessⁿ - Remain^t man he must resort to other actions -

To the act of Tresp. is founded on possessⁿ - i. e. it is a remedy for injury done to possessⁿ he can sue a lease right to possessⁿ is suff^r provided no other is in actual possessⁿ & as of disgrace - & for this division has actual & adverse possessⁿ -

In the former case the party is deemed to have possessⁿ

Trespass to things Real -

Blow. 540
 4 Leon. 184.
 2 B. 147.
 2 Swift 767.

Said in the books that the possessor in this case must also be lawful & that an intruder of course can't have the action. This as a gen^l rule is incorrect -

I think the rule applies only as between a wrongdoer in possession & the rightful owner, i.e. he who has the right of possession. Lately decided that any rightful possessor is sufficient to support an action ag^t the wrongdoer. The object of the action is not to try title - to be sure the right of possession is a good defence - Possession is title sufficient ag^t a stranger. In fact the whole res gestae consists in this case in actual possession & an invasion of that possession where a stranger is defat^d - Secus in Ejectment. There Off must have the right of possession.

1 East 246^b
 11 Geo 54^b
 Miller. 221
 2 Eli. 1238
 3 Burr. 1563.
 Lawes 1587
 Esp. 407
 2 Roll 249. Com. 2. Hosp.
 32. alij. 7.

2 Roll. 556
 4 Leon. 184
 5 Bac. 168. 28.
 Com. 2. Hosp. B. 3

It follows that a person in whom is the freehold can't greatly maintain this action for an injury done to it while in the lawful possession of another even tho' the injury is to the freehold itself actual possession in Off being necessary: if the party in possession is a wrongdoer see distinction post.

Trespass to things Real

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Case of 'Ten' at will is said to be an exception to the rule - Reason is, 'Ten's' power is so precarious that the owner himself is considered as having power -

To an 'Ten' can't maintain this act at Com. Law - unless he has obtained actual power by entry - tho he

How. 13.2.

2 Roll. 55.3

Rep. 3. 404

Com. 2. Sup. 13.3.

5 Bac. 106.40

may make a lease before, viz. Ejectment / This don't apply in Com. for he can maintain provided no other is in power - for he has the constructive power.

Again a person dispossessed of Land cannot, according to this rule before recently maintain this action for an injury done to it between the time of dispossession & recently for he is not in power at the time of the injury.

Don't abate

Exp. 4/18.

Bac. abate

Roll 20. 145.

55. -

But it is said if the party's right who is dispossessed determines in the mean time so that he can't return, he

2 Roll. 550

Com 2. Sup. 13.2.

may have Trosp. for an injury done after his dispossession - This is from necessity - since if it were otherwise he would be remediless This is rarely laid down -

But after dispossession & actual recovery, he may have this action aft dispossession for all acts committed during the dispossession - for as between these parties the power of dispossession after recovery is considered by relation as having

Trespass to things Real.

here continued. The fiction of Law is invented for the very purpose of giving him a remedy. Fictions never work injustice -

11 Co. 51^a Hob. 88.

2 Roll. 554-50

1 Roll. 100-1.

2 Inst. 282. Co. Litt. 257.

He may therefore have an action for the
mesne profits, & must lay his action with a
continuance Com. D. Hosp. B. 2.

But ever after recently, the party disseised
can't maintain this action ag^t 3^d person; i.e.
strangers for injuries committed during the disseisin
i.e. between the disseisin & recently; for here the
fiction don't apply - it obtains only as to disseisin & disseisin.
Thus A disseises B for 5 months & during that time J.T.
enters & trespasses, now the disseisee can't have Hosp.
ag^t J.T. The same is true if the disseisor conveys
to J.T. or J.T. disseises disseisor & he goes into possession
& afterwards B gains actual possession, still he can't
have Hosp. ag^t J.T.

5 Inst. 188.

11 Co. 51^a 2^{ed} Co. Litt. 150. Polk. 99. 354. Authorities are contradictory on this point
1 Roll. 2. 1. Contin. 2. Roll. at. 554. 579. Co. D. 840. Moore 481. & Com. D. Hosp. B. 2.

This question is still in dubio - on principle I should
think the fiction might extend to third persons for
no injustice would be wrought - Reasons for
the rule are - 1st That the purchaser it is supposed

Trespass to thing Real

59

Has paid the disseisor a consideration & ought not to pay twice - But I answer Le has either made a bargain of Lexan or he has taken covenants of indemnification & has his remedy on them -

V Le said the stranger is liable to the disseisor, if there was no contract & he ought not to be subjected twice; but I answer, perhaps the disseisor is not responsible. I think it more reasonable that the second disseisor should run the risk of paying twice, than the disseisee should be exposed in the least degree -

But the rule that the disseisee after reentry can't have this actⁿ ag^t Stranger holds at any rate only quoad actionem not quoad proprietatem as ag^t the second disseisor for the disseisee may after reentry take the profit, as corn grass or profits i.e. the fruits of the land which grew during the disseisin wherever he can find them. Reason is the artificial difficulty arising from the fact that the act does apply here.

The act of the wrongdoer may after his right of action but not take it away - nor take away the right of property -

Then arises the question whether disseisee may have an actⁿ as before for the conversion or use of the profits by second disseisor - seems he can -

1 Roll. 786-7

Co. Litt. 55^b

11 Co. 51-2

24. 31 -

40^a 132

5-6 85^a

1^a 61. 464

Doug. 21.

Ans. 11. 112^a

Hall.

Doug. 11

Ans. 11. 73-4.

Trespass to things Real -

Disseisin may before recently maintain this action
for the original disseisin - for that was committed when

5 Bac. 168. 67
Comm. 2. Sep. 32
2 Roll. 553. L was in possession - it was an invasion of his possession
in point of fact - So also for a Tresp. committed
before L's disseisin -

1 Sid. 347. 2 Roll. 551. A person who is tenant at will or sufferance
5 Bac. 167. 13 Co. 69. may have Tresp. only ag^t a stranger not ag^t lessor
Co. Litt. 57. 2 Roll. 150. or landlord - for the entry of these determines the estate

1 Rash. 139. 5 Bac. 187. But lease for life or years may have Tresp.
2 Inst. 105. ag^t lessor - yet I think lease at will may have Tresp.
ag^t lessor for invasion of the emblements - for this belongs
2 W. 116. to the leasee -

Said however that lease at will can't have
this action ag^t any one who enters with or by the
color of right - i.e. under pretence. This can't be Law
1 Sid. 347
5 Bac. 167. for such a person may be an actual wrongdoer, &
5 Leon. 2. Sep. 32. ag^t such, any person is suffice -

Said that lessor at will may maintain this action
ag^t stranger, if the Tresp. injures the land. Reason is
the power of the leasee at will is that of the lessor
he is a species of servant & is liable to be turned out
at pleasure - Has no adverse right to the Land
he has to the emblements -

Comm. 2. Sep. 32
2 Roll. 551.

Excess to things Real

81.

5 Prae 167. If lessor of a term for years reserves the trees, he reserves the land on which they stand - of course he may have this actⁿ ag^t any one who cuts or injures them during the term. He reserves the particular spot on which the trees grow & retains possⁿ pro tanto.

12 L. 2. 1. 3. 2. If the lessee commits voluntary waste, Lessor may have Tresp. ga. clau. fr. ag^t him; for such an act determines the estate & of course puts Lessor in possⁿ & makes lessee a stranger. Lessee with permission or negligent waste - this does not determine the estate.

5 Prae 167. A person entitled to the reversion or the benefit of Land may have Tresp. ga. clau. fr. for the injury done to it. This supposes he has a present interest & possⁿ of the reversion at the time of the injury. ex. gr. Pasture let for the summer -

12 L. 2. 1. 3. 2. The so much stress is laid on being in possⁿ yet P^r need not be in possⁿ of the land at the time of bringing the actⁿ suff^t to be in possⁿ at the time of committing the Tresp. for then the right of actⁿ accrues - ex. gr. Tresp. to dig on the land, which he sells to manow - Here he may have the action after having sold -

Blow. 491.

2 Roll. 569

5 Prae. 167

5 Com. D. Tresp.

B. 2.

Trespass to things Real

In 1004
1 Burn. 143.
Esp. 3. 428
Antie 1 Bulst.
157 not law.

The owner of the soil of a Highway may have
this act for an injury done to it, while it remains
a Highway - He being a Highway entitles the public
to the right only of passing over it - The title, soil
& power continue the same in the owner, unless
some other person acquires him by enclosing it -

Ans. Clin. 169
2 Rolle 588.

It should be said by owner
alone -

Auction has been made, if a man lets land
to another to till on shares & an injury is done
who must bring the act - Poly some, the owner alone
I don't care join, for he has not power before the
crop is severed - He agreed that they may join for
an injury to the crop, tho not in Ches. ge. cl. fr.

Yet in another case it is said that if B agrees with
the owner of the soil to plow, sow & give the owner
half the crop if the injury is done to the crop
B may sue alone in Ches. ge. cl. fr. for treasuring
down the crop, for it is said that it has no concern
with it till severed & is not jointly interested
before & then he is entitled to his share as a
Species of rent, he cannot have the act for the
injury to the crop but may to the freehold -
These rules seem contradictory or inconsistent
The latter appear to me preferable -

Bulst. 85.
Esp. 3. 402.

Trespass to things, Real -

63-

Ans. to Qs. 193.
Rep. B. 404
v. B. 1. 1900

Husband & wife may join in trespass for injuries committed.
See case - for their wants survive to her -

Litt. 2. 116 317.
See Litt. 198a
2 Pl. 194.
24. Pl. 387
Rep. 404 vide
"Trespass in com"

Joint in Com. a Coparceners as well as joint Tenants must join in this action for an injury done to the subject held in com; except - The action is joint - the interest in the person right is com. & tho their estates are several yet the damages to be recovered are entire. can't be divided -

Nov. 280
3 Nov 382
Rep. 2 398.

If a commission of Bankruptcy has been issued against one who was not subject to the Bankrupt Laws & the assignees take possession of his real estate - He may have this action; for the commission is void -

For what injuries this action lies & what not - Every man at Common Law is liable not only for his own trespasses, but also for his cattle injuries on the land of another & much more if he permits or drives them on - To subject the owner for the injury of his cattle, it is not necessary to prove negligence or fault - Whereas for injuries done by domestic animal, as dogs &c he is not liable unless he knows the creature is addicted to mischievous tricks In case of cattle Trespass on Cl. pr. is the action & other cases, case is the action. See no reason for this distinction or difference

3 Pl. 211.
5 Mac. 174.

Trespass to things Real

2 Roll. 565
5 Bosc. 181.

But if the cattle of one enter & do damage on the land of another, thro' the negligence or fault of the latter, as not having his fence good which it was his duty to maintain, no act^r lies — vide Replevin

3 Bt. 211.
Exp. 3. 388
5 Bosc. 179.

And if cattle of one are on the land of another wrongfully, the owner of the land has his election of two remedies, he may either distress them as damage feasant & hold them impounded till satisfaction made, or have the act^r of keep. qu. ch. fr.

5 Bosc. 188-9.
2 Roll. 526.
Exp. 2. 387.

This act^r lies ag^t an "agistor", i.e. one who takes cattle to depasture for another. So if the cattle stray out of his pasture into that of another — Some say the act^r must be bro^t ag^t the agistor & him only I think it may be bro^t ag^t either. The agistor is bailee of the cattle & for the sake of redress he is the owner —

Lalk. 248
12 mod. 688.
Exp. 3. 387.

Where the owner has his election of two remedies as in this case between distress damage feasant & keep. qu. ch. fr. he can't regularly have both — one is a bar to the other, & either is suff^t, because he is entitled to only satisfaction — for distinctions vide Replevin

I trespass to things Real -

5 Brac. 179

A man may enter on another's land to do a duty as to build or repair a bridge & cannot do it witht going on B's land - he is justified in going on it - this necessity -

If A has sold trees growing on his land to B. B may enter on A's land to cut & carry them away - that is implied in the contract. This is precisely like the case of land sold which is surrounded by the land of the grantor, i.e. in the body of his farm - in which case the law gives a right of passing to & from the land -

1 Brac. 180.

2 Roll. 587

Anciently it was holden that entry of one on another land adjoining a navigable river for the purpose of tracking boats or navigable craft was justified - public good. This is now denied to the Law -

1 La R. 725

5 mod 163

contra 1 Burn 35

292. 3 Br. 253.

It is well established that if a public highway is impassable, travellers may go on the adjoining land for the purpose of passing - required by public convenience. This suppose the road is obstructed for he may not go on the land because it is more convenient merely -

Wolton 248 Lev. 334

3 Br. 253. Rep. 2. 400.

2 Show 28 La R. 725.

2 Br. 36. Doug. 716.

But this rule don't hold as to private ways, for public good don't require it. public not interests in it -

Trespass to Thing, Real

67-

Day 716
Taylor on Torts
214 26.

But this does not hold as to private ways, for the public good does require it so, not into, beside the party is not bound to keep it in repair. Whereas Corporations are liable to the public for not repairing a public highway & travelling

2 Roll 252.
5 Dec 187.

a man cannot maintain this action for an injury done to the highway of land on which he has only a bare right of passage i.e. to depasture; for he can take it only by the mouth of his cattle - till he uses his mouth, he is not possessed of it.

How 71
2 Roll 555.
2 Roll R. 208
5 Dec 182.

The entering another's house without permission given either by the party or by the law, i.e. with a licence or lawful authority is in strictness a trespass, even though the door is open. The law seems it to be done with force since to an act which the law prohibits.

bro. C. 246.
2 Roll R. 56.
5 Dec 182

But if one person has unlawfully taken the goods of another into his house the owner of the goods may peaceably enter with permission to regain them, though the door being open - hence the owner of the house is the first wrongdoer - He may not however enter with force or against permission - The law gives the licence

5 Dec 182.

It is a general rule that any person may enter the house of another with permission, to suppress a riot, or an affray or other disturbance of public peace. This is for the public good - In both these last cases he enters by licence of law.

Trespass to things Real -

20th. 212
Corp. 280~

The Law also allows one to enter the house of another to pay or tender or demand or receive his money, then and if he does it peaceably is the door being open

5th 212~

An officer may peaceably enter the house of another to execute legal process -

And a house may be broken open to execute criminal process provided the officer first demand admittance & make known or declare the cause of his demand - if he does not first demand so before he enters by force, he is a Trespasser

1st Bac. 154
4 Co. 91.
4 Leon 41.

This is true only in cases of necessity -

1st Bac. 154
2d Co. 287. s. de. 83
Corp. 1. -

But an officer, i.e. a Sheriff may not break or enter door or window of another dwelling house for the purpose of executing civil process, whether to take body or goods -

4th. 82.
Sec. 8. 909.

4th. 91.
Corp. 1.

Anciently a man's house was his castle where he might shield himself from all civil process & set the Law at defiance. Reason given was that peradventure thieves & robbers might be admitted; this is not the true reason - the true reason was that every owner of a house was a kind of Baron or Lord - It grew out of the Feodal Law -

Yves pass to things Real -

69

But this privilege of castle is now construed
strictly - extending only to outer doors & windows of
a mans house - so it don't protect the inner doors
chests closets or any internal inclosures - they may
be broken after demand & refusal made - he that
to effect his purpose he may dismantle the whole
interior of the house - but he may not break
inner doors after entering unlawfully -

Comm. 6. 9.
Holt. 62. 203
Coh. 2. 604.

This subject best treated in Com. by Ed. Mansfield -

This rule don't hold in case of writ habere
facias possessionem, which issues after judgement
in Ejectment, for tis in the nature of thing impossible
to give possession without entering, whereas in other
cases the writ is not of course defeated by the privilege
(for the subordinate divisions here vid. "Hffs")

5 Co. 91^b
2 Bac. 179
5 Co. 423
"Ejectment"

A Hff may break i.e. he is justified in
breaking a house to execute a legal search warrant
Tis in the nature of a criminal process - a search
warrant is defined to be a warrant obtained by a
party whose goods have been stolen to search for
them - where he suspects they are - But all gen^l
search warrants are illegal, strictly void & afford no
justification, or to search for all stolen goods or to search
for goods suspect in suspicious places.

Kal. 2. 610
2 Wils. 275-91.
Coh. 2. 399.
Carr. 409
Salk. 418
Holt. 251
West 31.

Press pass to thing, Real

And as the Law is now settled - the following requisites are necessary to a good search warrant, viz-

1st The Party applying for or requesting it must make oath to the particular facts on which the application is founded & also of his belief that the goods are concealed in a particular place -

(2) The warrant must be executed in the daytime & secu a Trespass.

3rd It must be executed by a known officer, for the Law reposes confidence in him - not by anyone specially authorised or appointed for the purpose -

4th It must be executed in the presence of the informer. He must point out the place to search & take the responsibility on himself -

And even tho all these requisites are observed yet the informer is justified or not by the event tho the magistrate & officer are justified whatever the event is - If he don't find the goods he is a Trespasser ab initio - He assumes the Risque -

In all these cases where the entry was, not lawful
Thesp. qu. clam. fr. lies

M.S.C. 80.

Exp. 2. 389.

2 Nov 291-2.

Exp. 2. 389

Trespass & things Real -

71

As to whom this actⁿ will, & as to whom it will not lie -

Exp. 401. For cutting timber, nor for cutting & carrying away
Litt. sec. 71 For Lessor is not in possession of the close - Lessor has
4 Co. 52 no right to the timber -
Allen 83

But if Lessor after Lessor cut the timber permits it to lie long enough, to become personal chattels, & then carries it away, he is liable in Trespass, not for the injury done to the close, for for the cutting but Trespass, done to the person's property by the carrying it away - Trespass lies for the chattel i. e. & he has the constructive possession in Law - It becomes personal property whenever the act of cutting & carrying away is not one continuous act - as if he should cut today & tomorrow remove it - Whether this is a continued act or not depends on circumstances (vide *Houes*).

If one leases land reserving trees trespass on d. for his ass^t Lessor for cutting them; for the lease does not put Lessor out of possession of them -

Co. Litt. 59a The Lessor is a stranger to them - & can act as his ass^t Lessor as well for cutting timber trees on the land even tho no such reservation is made, for

5 Co. 13 the very act determines the estate - So if doing the positive injury to the subject -
Reg. 120.4

Trespass to things Real

2 Bl. 150
Esp. D. 400

But the act^r will not lie in such case as
Tent at sufferance unless lesion entered, for the
act don't determine the estate - But after entering
the act^r will lie: for this determines the estate -
Before entry he is not a disseisor nor stranger
but a Tent in possession

2 Ld. R. 739.
Esp. D. 400

But the trees are reserved or excepted in a
lease for years, yet lessee is not liable for injury
or destruction done to them by his cattle - for
he has the use of the soil - a right to suffer his
cattle to go at large on the land -

406. 1st.
Litch. 10. 110.

This act^r will lie against an Insane Person
or Lunatic, for the intention is not material,
malice is not necessary -

4 Bl. 30.
1 Lev. 124
Litch. 409
148. 613

Every person concerned in committing Trespass is
a principal not an accessory, for there are no
accessories - ex. gr. All aiders abettors &c. So if A
command or request B to do it & he does it. They
may be jointly or severally sued -

It is said if A agrees to a Trespass committed
by B for his benefit - A is liable tho he did not
command or request it - By agreeing to it, is
meant his actually taking the benefit of the
Tresp. If ignorantly done he would be liable in Tresp.

Trespass to things Real - 73

5 Bac. 445. For injury to personal property. Lest. o. House would be -

Under "Master & Servant" for distinctions on this subject.
But generally the master is liable for the acts of the servant done under his command -

If several persons join in committing Trespass
860. 157. the suit may be agt one two or three or any number; i.e.
590. 649. as several or joint or both joint & several

It is said by Bacon that if the party injured has lost
his act agt one it is a bar to a suit agt another for the
same trespass. This is not Law. The pendency of one
5 Bac. 185.
Ta. 420.
Conte -
5 Bac. 192. can't be pleaded in bar of another - He may sue each in
a separate action.

It is true however that he can have but one
satisfaction, i.e. one recovery in damages - He can
pursue only one of them to judgment & this judgment is a bar.
The reason is, what was before uncertain is now liquidated
& become certain; he is reduced in rem judicatum. Whereas
if two are sued on a joint & several contract, judgment
be the whole amount may be had agt each, the only one action
can be revived - & if it is relief may be had except as agt
costs. In this case indeed there is always a rule of damages
& therefore a party would not for a mere speculation
pursue the second to judgment. For he can get no more.

Trespass to things Real-

Bro. Jaz 73

yelev. 67. 4 Bac. 115.

Robt 68.

But in Tresp. the damages are presumptive -
diff^t juries would estimate them differently -
so take the most -

Bro D. 30.

Rep. D. 410.

A former recovery in Tresp. is a bar to any
other action for the same offence

It is said also by Bacon that an acquittal of
Def^t in one act is a bar to another - I think this is not
now Law - The record in one case can't be given in
evidence in another But in case of a Recovery the
record can be given in evidence only to show the
fact of there being a recovery - not to affect the issue
not to show facts - To be sure a release to one
is a release to both or all - So is a licence -
Indeed what is conclusion is that if both were
sued together, one might be condemned & the other
acquitted -

If a person who has granted the pasture
or habage of his land to another - enters on the land
& takes off or disturbs the enjoyment, or injures the
habage, grantee may have the act ag^t grantor -

Co. Dig. 285.

5 Bac. 187.

So only a person in possession may maintain this
act ag^t lessor except licence at will & sufferance

Trespass to things, Real

75-

It seems settled that if A's cattle fall into B's close thro' the defect of B's fence, & thence thro' the defect of C's fence into C's close - here C may maintain this actⁿ ag^t A; tho' the fence was deficient - The reason is C is only bound to guard ag^t the cattle of B, i.e. those put in by him - yet here A may have cause ag^t B for indemnity, if A is subjected - for B was the primary cause of the trespass being committed -

Cent 181
1 Freeman 377.
5 Bos. 189.

I have now gone thro' the gen^l nature of Tresp. who may bring the actⁿ & who not - for what & ag^t whom it may be brought - I come now to the Pleadings in the actⁿ of Tresp. qu. claus. fe.

Where the trespass committed consists in abuse of authority conferred by Law - to support for the Plff to state the Tresp gen^l in his declaration i.e. He is under no obligation to notice the authority given by Law -

The particular injury or abuse of the authority comes out in the replication by way of novel assumpsit. This actⁿ is originally to be pro'd in the count. For Defor may plead the authority by way of justification e.g. Suppose unt distressed for the distress abused - To Tresp. for breaking house & taking goods &c, breaking furniture &c

Trespass to things Real.

Justification, of the entry, replication stating the subsequent wrong particularly by new assignments.

Jack. 221.
Bul. N.D. 81.
1 H.R. 479.
3 do. 292.

If a person commits theft in a public house
he who brings the act need not state particular facts
Indeed this would be unlaugherlike, he may sue for
breaking the house first -

Lalk 119
Falk B. 146
Ho. 61.

and Pff in this actⁿ may include several
distinct trespasses in one declaration. This is ac-
-cording to the rule, that several causes of action of the
same nature as^t one party may be included in
one declaration - Thus entering & cutting trees
breaking his house, destroying his goods &c

Exp. 407 Ho. 61
1 Ld. 225. Co. 264.
Lalk 119. 642
2 Brown 114
Comin 10 Co. 130.

And for the purpose of shewing the aggra-
tion which attended the Trespass in order to increase
the damages Pff may state in his declaration
wrong for which he could not maintain any
action; ex. gr. Breaking & entering the house &
beating wife &c or children - I don't suppose
the injury such that he loses the company of
the wife or the service of the others - There are
to shew the aggravating circumstances with which
the trespass was committed for which the actⁿ lost -
These facts don't affect the issue of guilt at all, but still
they are proper to go to the Jury, as they shew the enormity of the deed.

Pleadings in Trespass -

77

It seems well settled that in Tresp. qu. cl. fr. Off may join the beating of wife, with it in an action per quod servitium amittit or consortium amittit.

But this is true only where the beating is a concomitant part of the trespassing act, i.e. where it can be treated as the same transaction. & they cannot be joined if committed on diff't days - for if the trespasses are separate, the proper act is case, for the loss of service is a mere consequential damage.

In the former case the breaking is the underlying of the act - the beating is a continuation of the

2. P. 168

La R. 1032

East. 113.

Wile, 43. 202.

East. 3. 307.

act - But if they are on diff't days, there is no propriety in joining them; one is case & the other is Trespass.

Where the acts may be joined in the same declaration then if he wishes to recover for loss of service he must lay the act with a per quod servitium amittit - otherwise the beating is mere aggravation & evidence of loss of service is admissible & no recovery can be had for it, unless the loss of service be laid in the declaration.

Lalk 642.

The Tresp. must be laid to have been committed on some certain day - yet need not be the true day - need not be proved as causative & immaterial.

Pleadings in Trespass-

But it's material universally if it's necessary to prove according to the truth of the fact as laid
 Hence it's immaterial -

So if a bond declared on to be dated July 8th
 & it is dated May 2^d - There is a variance - the time is
 material -

So if Tresp. He may prove it committed in
 any other day, it's immaterial -

In declaring in Tresp. time is prima facie
 not material; but may become material by
 the plea of Defdt. As if Defdt. should justify trespass
 on one day & should assign another or a diff. day.

As a Pff. may join in one declaration
 several Trespases - or he may sue each of
 them severally or singly, i.e. in a separate act
 But it is said that if it appear on the face of
 the declaration that a certain person not sued

1 Leon. 41. Holt 104. was a party to the trespass. with the Defdt. the
 199. 5 Mac. 192 - declaration is ill - This appears to be questionable.
 1 Lard. 291. 8 J. K. 788. Wm. in Lamerden. considers it not Law.

This appears destitute of principle for the clear,
 if it's not on the face of the declaration it don't
 affect the declaration - even tho it appear in evidence

1 Inst. 282^a
 lev. 6. 32.
 Bop. 2 407.
 Cro. Litt. 238.

Str. 1100.
 8 Co. 139. -
 5 Bae. 185-6.

Pleadings in Trespass.

79

1 Saund 291. under the genl issue - or he pleaded in abatement
6 R.R. 768. This is allowed too that the Plff may sue one if he pleases.

Indeed it has always been holden that if
it appear on the face of the Declaration that
the person not sued who was concerned in the Tresp.
with the Defdt. is unknown to the Plff. the
1 Leon 41
5 Bac. 193. pleadings are good - yet it seems the action appears
to be joint as much as in the case above.

Yet the Plff always may sue each alone, saying
nothing of the rest - i.e. the practice is to take
no notice in the declaration of any party to
the Tresp. who is not joined as Defdt.

It is essential at Com Law that the declaration
should charge the Tresp. to have been committed
with Force & arms, vi. et armis, & contra pacem
These at com Law are essential averments - of the
gist of the action - not aided or cured even by verdict.
The reason is the Trespasser is liable to pay a fine
to the King - so this must be mentioned in order
to let in the claim of the King & to authorize a
Capiatorem - Whereas if 'tis not with Force, the
party is only amercied & the judgem^t is misericordia.

By Stat. 16 & 17 Car 2 the omission of these words in the
declaration may be amended after verdict, tho based on
genl demurrer -

1 Show. 28.

4 Bac. 11.

Falk. 636-40

2 Bac. 506.

5 do. 191.

Cartt. 86. 390.

J. N.B. 196.

Falk. 636.

Exp. 2. 408.

Pleadings in Trespass—

And now by Stat. 5 of Wm 3 Mary the judgement of captivator pro fine is taken away— It enacts however that instead of judgment the Pff shall pay by way of fine to the King & shall recover it from the Defor by way of costs—

5 Bac. 507.

Bolt says, now since the Stat. the words in et animis are not necessary— since both judgments are now misericordia— This is not Law. For no fine is paid, unless the act is said to have been done in et animis et contra pacem. These words then are still necessary in Eng. to bring the provisions of the Stat 5 Wm 3 Mary

La R^d 985
5 Bac 191-2

In con. it would seem on principle that these words are not necessary, as matter of substance. For here no fine is paid— judgment is the same in all cases— judgment of captivator pro fine is unknown to our Law— Indeed it was in 1798 decided that the omission of both sets of words was not ill on special demurrer. I don't know but the Ct would now consider them but as matter of form. I should think they would be necessary in point of form— in the above case (Bosworth vs Phelps) a writ of Exon was granted and but not prosecuted—

As a gen^l rule the injury for which an act is prosecuted must be specially alleged, in the declaration, i.e. with particularity.

Pleadings in Trespass.

81

One exception viz^d where the injury arises of itself & cause
 here tis sufficient to state the wrong genlly - as may be, & yet
 be intelligible - This is to prevent indecency on the
 face of the record - So not bad even in point of form

1 Ed. 225.
 5 Bac. 124

It is necessary to state in the declaration the
 value of the property for taking for injury to which, the
 action is brought. This rule applies only to Tresp.
 on property, or something in the nature of property -
 i.e. a subject of valuation. So if the act is for
 treading down herbage, the value of it is to be stated;
 But can't state the value of an arm or reputation

So also must genlly state the quantity, - yet it need
 not be the precise value or quantity - Indeed in
 some cases no quantity can be stated, as catching
 grass, or fear &c. for it can't be ascertained - The omission
 of either is aided by verdict, for that supplies the
 value or quantity

Ans. Jac. 135.
 1 Yea. 39.
 Rep. T. 407.
 5 Bac. 196.

3 La. R^d 113. - } as to Joins -
 Rep^d 488-97.

Rep. 407. } That tis aided by verdict -
 1 Burr. 245.
 Ans. Jac. 130

In Tresp. of a permanent nature where the injury
 is such as is capable of renewal or continuity & is renewed
 or continued, P^lff may recover by laying the Tresp. -

Pleadings and ~~Express~~ ^{Express}

in his declaration with a continuando. Thus, if the cattle of one enter on the Land of another from day to day - he may lay the injury with a continuando from such a time to such a time - because the acts are so blended that they cannot be set apart - In these cases the trespasses are called permanent.

Dy. 230.

The Plff is not obliged to bring the action in this case with a continuando, but at his election

Le R. 240
Lalk. 638.
3 Pl. 212
2 Roll. 545.

Laying the action with a continuando is only laying it with a continuation.

But when the trespassing acts are such as terminate in themselves, & being once committed cannot be continued, they cannot be laid with a continuando tho done at diff^t times - Thus cutting trees on diff^t days - For the cutting of one day, is distinct from the cutting of another. Is also if one should enter on another's land & kill several beasts on diff^t days it would be improper to lay the act with a continuando; for the acts are

Le R. 299. 975.
3 Pl. 212. 124. 319.
Lalk. 638-9.

complete, independant, & not continued acts. Thus, with treading down the same grass on several days - or consuming the sheaf -

Pleadings in Trespass

Lark. 131.
3/16. 2/12
Ld. R 823

But in those cases where there are several trespassing acts on diff^t days but don't in their nature admit of continuation yet they may be used for in one declaration & charged to have been committed on divers days & times, between such a day & such a day, the Plff may recover for the whole in one action laid with a continuando: & if he consumes or tramples down grass &c he may bring a separate action for each day separate injury

It is to be observed that if several trespasses are charged to have been committed on one day - no evidence can be introduced of trespasses which are not committed on one day; i.e. on the same one day. Ld. R 40. 976. To be sure he may say them to have been committed on one day & yet prove them to have been committed on another -

There are two modes of declaring with a continuando: 1st trespass may be laid with a continuando for the whole time, from such a time to such a time & this is proper when the trespasses are committed with intermission for a longer time than one day. But when the several acts are not done in continuity but at diff^t times, at intervals, they may be laid with a continuando.

Pleadings in Trespass.

Muk. 194
5 Bae. 197.8
Lut. R. 240
R^o 396.

not from such a day to such a day, but by continuation
on diverse days & at diverse times from such a day
to such a day - But the Particulars intervening
days need not be laid - (See in this distinction
attended to in practice!) -) ex. gr. Cattle
trespass for several days in succession - again
they enter at intervals.

But where there has been an ouster of the possessor
& a re-entry, here the ouster & all acts done under it
may be laid with a continuando, for the ouster
continues as long as the dispossession - The other acts
are incidental to the principal Trespass -

And the rule goes further for if the owner
is ousted & then re-enters, he may lay the
whole with a continuando.

If Trespasses which can't be laid with a
continuando, are so laid, the declaration is on
the face of it fatally ill, not aided by verdict -
For there is a fatal repugnancy -

But if several Trespasses are committed, some
of which might be laid with a continuando &
some not, & all are laid with a continuando, the
declaration tho' ill on Demurrer is aided by verdict,
for then the damages shall be presumed to have been assessed for the former

Geo. C. 182
Lut. R. 397. 475.
Salk. 638
"Rejoinder"

Salk. 639. 59.
1 Lev. 210.
Esp. J. 488.
5 Bae. 199.

2 Lev. 94. 192. 375.
Salk. 639. Lut. R. 240.
2 Shaw. 196.

Pleadings in Trespass

85

As to the Pleadings of the Defat. for gent issue see "Plead Pleading"

The gent issue in this case, as in all other actions for
Corp. D. 411 misfeasance, is not Guilty

If a person indicted for Corp. has confessed it, & that
confession is on record - he is forever entitles to plead not guilty
in a civil suit or act but for the same offence, i.e. Corp.

Yet this is not an exception to the rule that a
judgment is no evidence except as between parties & privies -

it being res inter alios acta: for it goes on the ground

that his confession is always good evidence - it answers

no purpose as matter of record but being good evidence of

2 Mont. 333

Corp. 8. 411

confession. His confession out of Ct is good evidence, but

is not conclusive - but on record it is conclusive. But

if he were convicted by verdict of Jury this is conclusive -

At least Law a special justification in trespass must

be specially pleaded - it can't be given in evidence

under the gent issue - ex. gr. license of Plff by process

of Law - The reason in the gent issue denies the facts.

justification confesses & avoids them. So the evidence

under the gent issue would be repugnant to the plea

of justification. See, under Stat. Com.

Co. Litt. 262.

Litt. 287.

Ex. R. 732.

19th. 61.

But Defat. plead in Tresp. under gent issue, may
give in evidence a leave for years. for this disproves

Pleadings in Trespass.

2 Roll. 576.

the material allegation that he broke the Pff's close. yet this is not a proper justification, for it don't admit that the acts were committed on the Pff's Land.

So also on genl issue, Defor. may give in evidence & prove Tenancy in com. with the Pff. for this defeats the act: as between Tenant in com. the act don't lie.

Exp. 3. 411.

Palk. 4

But if the fact is that he is Tenant in com. with a stranger, this can't be given in evidence under the genl issue nor is it pleadable to the act: must be pleaded in abatement only; 'tis a mere non-joinder of necessary parties in an act: sounding in tort.

When Pff. is sued in trespass for act done in execution of final process, he may plead the process with pleading the judgment & provided the act is by a party to the judgment as Defor, for he must shew the writ whether the judgment is in force or not. Suppose the act by the Pff. in a former act or a stranger, he must shew the judgment to be existing or subsisting as well as the execution, for he is a party & is bound to know the judgment. Pff. is a stranger to it & this may be reversed & if he takes judgment afterwards it is at his peril. Nay if a stranger is sued, he must shew the judgment because he is not under the necessity of alleging the writ or judgement.

Palk. 406.

3 Lev. 20. -

Exp. 2. 419.

Le. R. 733.

Pleadings in Trespass - 87-

Lalk 107.
409.
Esp. 2412

But any one acting under, i.e. in aid of the Shff & at his request may justify as the Shff might. He is bound to obey the Shff & the Shff's process. But the request is traversable -

5 Brown 2631.
2 B.R. 701.
Ld. R. 733

If the act is done by a stranger, to the original judgment, for an act done in the execution of final process, he must in justifying allege the judgment as well as execution: for the Shff don't know of the judgment. Tenuis if done by the Defor in the execution -

Accord & satisfaction is a good defence, i.e. plea to trespass. But accord alone is not sufficient. It is a bare executory agreement - it cannot be executed before it prevents the action: & the whole amount of accord & satisfaction is an agreement executed. The most approved mode of pleading is by way of satisfaction for if accord is pleaded all the particulars of the agreement must be specially pleaded & must prove a special precise performance of those particulars. But barely mentioning that the Defor delivered by way of satisfaction & Shff accepted it in full satisfaction of his claim, is pleading by way of satisfaction -

9 Geo 2d
Duct. Pleas. 19.
Tr. 573.
1 Roll. 128.
Skin. 391
and Pleas to
assumpsit -

An award of arbitrators is another good defence to this action - vide "Pleas to Ass."

Geo. 2d. 68.
Esp. 415.

Pleadings in Trespass—

A release is also a good plea in Bar— but here if a release before act^r has^d is pleaded, the Def^t must traverse the fact of another trespass committed between the release & date of the writ— Here: if the release is pleaded as given after act^r commenced, for no recovery can be had for trespass after act^r commenced— vide "Plea & Pleadings"

Talk. 222
Hob. 104
La. R. 224.

Where the trespass complained of was committed by two or more i.e. jointly, a release to one is a release to all— for the act of each is the act of all the rest— So each is guilty of the whole & is answerable for the acts of the others— a release of all the wrong one has done is a release of the whole wrong committed—

5 Co. 97.
Cro. Jac. 444.
4 mod. 379.
Cro. Litt. 232.

But if an act^r is brought ag^t two who sever in pleading & one is found guilty & damages assessed ag^t him: Off^r may enter a nolle prosequi as to the other with releasing the second— entering a nolle prosequi discharges him: so will a retraxit: Here in ten.

Hob. 70.
Rep. D. 415-16.
4 Prae. 282.

Cro. Jac. 30.
4 Mo. 678.
Cro. Jac. 73.
Litch. 216.

But a recovery ag^t one of several joint trespassers is pleadable in bar to any other act^r brought ag^t the others than can be but one recovery—

Pleadings in Trespass

89

By Stat. 21 Jac 1st Defor may plead in bar a disclaimer of all right to the subject ~~trespassed~~ on; & that the Trespass is by neglect & involuntary, & Tender of amends before act.

But - He must shew, (i.e. plead), how much amends (i.e. what sum) have been tendered, that the Jury may judge - Stat. extends only to cases of involuntary trespass & disclaimer.

No act Stat in bar.

Plow. 549.
2 Roll 570.
Lack. 686.

Stat. of Limitations is a good plea in bar -
Cognis in Ang. by Stat. 21 Jac 1st 3 in bar. In Ang. the Stat. must be specially pleaded, for the defence confers -
Exp. D. 410. the fact & so would be repugnant to the gen^l issue -
if given in evidence under it -

In Com. it may be given in evidence under the gen^l issue; this is by Stat. which enacts that all matters may be given in evidence under the gen^l issue except some act of the Plff -

Stat 273

In Com. Law. Special plea of title is not allowed in this act - because it amounts to the gen^l issue, & whatever amounts to the gen^l issue must be pleaded as such - Yet this rule is evaded by giving colour for if he gives colour, he may plead title specially. It amounts to the gen^l issue for it denies the fact of his lawfully entering on Plff's Land.

Pleadings in Trespass

Aside Pleading

3 M. 309.

10 Co. 90.

4 Bar. 102.

Lancs. 51-126. 150

5 Bar. 208-9.

Giving Colour consists in alleging some feigned title in
 P^{ff} for the purpose of putting his own title on record
 & submitting the question which is best to the Ct.
 This intended to justify the Def^t in converting of fact
 into a question of Law & in referring it to the Ct.

In Con the P^{ff} is always at liberty to plead title
 specially - not by estoppel that, but by implication - a Stat.
 which provides that when in an act of Tresp. before a single
 minister of Law on a Tresp. plea the Def^t pleads title, a record
 shall be taken pro confesso & Def^t shall become - (infer)

In Con Def^t may give title in evidence under proviso
 "found in one or more writs in a recognisance that he shall pursue
 his plea during a suit for the trial of his title at next t^h of Com. Pl.
 in t^h in which Tresp. is laid & pay all costs & that may be recovered of him

The Stat says that in a certain event viz Def^t not becoming
 bound in a recognisance, the plea shall abate - this does not mean that judgment
 shall be given ag^t him - cause is still to be tried as on a writ quod
 "where are proof of the Tresp. committed" But where Def^t enters
 into the recognisance he must bring his action in t^h & also in t^h

But a trial of title in Tresp. does not conclude the
 parties in Ejectm^t for this is of a higher nature -
 a record is conclusive as to the point which it imports
 to establish in all actions of similar or concurrent
 nature - so. gr. Tresp. qu. clau. fr. plea title - P^{ff}
 recovers, still Def^t may have Ejectment - or if
 Def^t pleads fee simple, interest, & Def^t prevails
 still P^{ff} may sue in ejectment complaining of the very
 injury complained of in the Tresp. action

Pleadings in Trespass

91

3 Bost 346. Nutt 395

6 Bof 2 twif 499 P in Emg. Exclusion is no bar to real action -

Of the Evidence in this action

2 B. R. 1165

3 Bown 1385 going to the merits, if not embraced by the issue, can be admitted, tho it goes to the merits of the case -

Under the gen^l allegation of alia enormia, Plff may give in evidence any matter of aggravation which will not itself support an action in Plffs favour, i.e. on the gen^l issue - So matter of aggravation may be given in evidence under the gen^l issue - But no evidence of that which would of itself support an action for the Plff is admissible, unless 'tis alleged - So he may prove that he entered the house & beat his servant - He may prove the loss tho not alleged, because the time place & circumstances can to be considered in estimating the damage - So the beating his wife may be given in evidence - He cannot prove loss of service, unless laid with a per quod to for the loss of service would support an act & the record in the first would not for an act for loss of service - whereas for the beating of Kerk he could not maintain a subsequent act -

Ld 225

2 Bown 1114

Est. 417

'Tis not usual in this act to set out the details of a close, yet if he does he must prove them as laid yet if he sets out a building as facing the Close he may

Pleadings in Trespass

Exp. D. 417. 2 Pol. Off. prove it as facing the N.B. for this is certain enough for
 Vel. 104. that purpose -

The time need not be proved as laid, yet
 when the act is laid with a continuando he is
 confined in evidence to the time laid in the Declaration.
 The reason I think is, the continuando from one day
 to another is considered as matter of description of the
 trespass - In other cases time is matter of form on
 principle - It is analogous to other cases - So in
 transitory actions, the venue is matter of form
 even in local actions -

B. N. D. 80.

Exp. D. 417

The party may however waive his continuando
 & prove a single trespass, or the trespass on any one day.

When the P. l. f. lays Trespass with a continuando,
 he must prove a re-entry on his part, otherwise
 he can recover only for the first entry - For
 he cannot sue for a trespass after a decision,
 till re-entry -

Exp. D. 418.

If P. l. f. makes a novel assignment, & the
 2^d issue is pleaded to it, he cannot prove Defor-
 quity of the trespass mentioned in the plea in bar -
 For by his new assignment he waives that mentioned
 in the plea - So if P. l. f. charge trespass on 1st of May
 Plea of license on that day - new assignment on the
 second of May - This is a new claim on the record
 & is in the nature of a new declaration -

Pleadings in Trespass.

93

Ans. B.
492.

To the genl issue may be pleaded to it. but it
of ~~them~~ only to that in the new assignment -

It seems to be a genl rule that if on plea of
justification Defdt proves so much as in Law amounts
to a justification, this is sufft the L court prove
all the justification as pleaded. So if Defdt. plead
that Offt held under Id. for a particular rent &
some feodal services & that this entry was to distress
for default - tis sufft the L court prove all the
services due, if he prove heul, & that he entered
to distress for a default in relation to them -

Mol. 148.

In an action by a stranger to an excon as a Shff
who acting under it has committed a trespass. Defdt.
2 B.R. 793 must plead the judgment & of course is bound to
5 B.R. 2631 prove it - to produce an exemplification of it -
Less if by a party to the excon as the Defdt is -
as to service vide "Tresp. to person's propy."

Ejectment & Disseisin

3 Bl. 199.

Esp. 427

2 Bac. 180

5 Co. 105.

9 do. 77.

Ejectment is an action by which a lessee for years when ousted of his term recovers it from the wrongdoer together with damages.

Disseisin (in law) is an act by which a person dispossessed or ousted of his freehold recovers it from the disseisor, together with damages.

3 Bl. 187. 199.

Ouster is an injury by which a Lessee in possession of land is wrongfully removed or turned out from it.

3 Bl. 189-199.

The word disseisin denotes an ouster of the freehold; the word "dispossession" an ouster of an estate less than freehold.

For the diff^r species of ouster vide 3 Bl. 187 n.

Law. act of disseisin is strictly a mixed action &

2 Bac. 180. Com. 58.

1 Com. Pl. 250. 3 Bl. 199.

so is the act called ejectment. Tho it does not

3 Bl. 118. exactly correspond with the definition -

Anciently the Plff in ejectment recovered damages only, no restitution. Tho if ousted by the lessor he might recover the possession by an act on the covenant for quiet enjoyment. But if the ouster was committed by a stranger, law had no other remedy than by ejectment. 3 Bl. 157-8. 200. in which he recovered damages only - Tho lessor might in a real act recover possession of the freehold.

Ejectment & Ejector

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afterwards however when the law of Equity began to compel the Ejector to make specific restitution, the law of Law also adopted the same mode of doing justice by rendering judgment for the recovery of the term damages only -

This practice appears to have been adopted as early as the reign of Edw⁴th. Since that time the remedy has been specific. and for a long time past, this action has been founded upon the action of a term only. has been in fact, the common & almost the only method in practice of trying the possession title to real estate. It has been used for this purpose ever since the reign of Hen. 7.

This is now done by a string of legal fictions, delineated in Bl. & Bac. No real fiction here; the Prochote is recovered directly by act of decision. Since the act has been thus used to try lessor's title, the damages recovered in it are usually nominal only -

2 Bl. 205. 2 Bac. 160-6. } In a real action except in assize no damages are recovered
2 Bac. 160-161. 6 Co. }
7. Co. Lit. 257. - }

How what things Ejectment lies.

It lies regularly for nothing of which the Plaintiff cannot deliver possession under the action in which it is the same thing, for nothing of which an entry in fact cannot be made

In general it will not lie to recover incorporeal hereditaments or things lying in grant merely -

Seco. to. 202. Sec. Dav. 140. Ex. R. 789

Ejectment & Dissein

But it will lie for land laid out as Highway in favour
 of the owner of the soil as the proprietor in C. For
 laying out a Highway does not divest the right of soil
 "Prop. quid. pr." But the land is recovered subject to the easement,
 2 Bac. 167. Cro. C. 182. So it lies in favour of the grantee or owner of the
 Lth. 1120. Rad. 303. 401. Rubage of land, tho the soil belongs to another —

But it lies not for a watercourse or stream of water,
 for this is fluctuating, & possession cannot be given —
 2 Bac. 167. App. 103. It should be but for so much covered with water.
 Exp. 128. Poph. 177. 2 M. 14. Grounds. 182. —

Exp. 128. The action will lie for an entire thing —
 Lth. 695. ex. gr. It will lie for a certain part of a close or building
 who may have the act.

Qrent Rule — No person can maintain the action
 3 Bl. 905. Exp. 580-578. Tho' poss. 190. Lth. 1005. unless he has at the time a right of entry; for tho the
 3 Bl. 779. 180. 191. 200. Lth. 1005. Lessor of Poff. supposed to have entered & made a lease,
 bonds 58. 10 mod. 177.

yet this fiction will not aid him, nor would an actual
 entry if he had no right to enter, since the possession
 title only is tried in Ejectment. The ultimate right
 3 Bl. 180-204 in lease in any. is tried by a real action. ex. gr.

But in bail action in fee & dies, it is a discontinuance
 2 M. 171. 2. 191. 2. Exp. 131. Lth. 1005. 2 The Lessee cannot enter. of course he cannot maintain

Ejectment —

Exp. 131-2. 3 Bl. 205. So if the lessor of the Poff. or those, under whom he claims
 2 Bac. 172. Poph. 102. have been out of the possession 20 yrs. in any. he is barred of this action
 by Stat. of Limitations 21 Geo. 1. which takes away his right of entry
 Stat. of Limitations in lease is 15 yrs after title occurred

Ejectment & Disseisin

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Both Stats. Leave the usual savings in favour of Defs, James covert, persons insane, imprisoned, or they could sue -

The possession or entry of the lessor of the Df. under the Eng. Stat. must be an actual possession & not presumptive -

Exp. 282. To that if he cannot prove a possession in fact within 20 yrs.
Bul. 102. He must be non-suited - In. If no other person has been in
Lic. 1142.
3 Bl. 208. possession? In case of vacant possession no person will be
Exp. 253. Down 129. let in to defend.

The rule is not adopted in Com. Thus a right of possession is deemed equivalent to actual possession provided no stranger is in possession & the right of possession itself is a sufficient ground on which to found the act of "Trespass" If the owner brings Ejectment within 20 years & is non-suited that does prevent the Stat.

Exp. 192.

An undisturbed possession for 20 years in Eng. or this

Exp. 292. Com. is not only a good defence to the act - but a sufficient

7 Bl. 492. ground on which to support it -

3 Bl. 179 180. In Eng. However such possession confers the possession

190-2. Exp. 2478. title only - In Com. such possession carries with it the right of property also & gives a complete, absolute title. This I suppose is upon the principle that he who has the title, has the possession in Law - Where the legal possession, the title is lost with it.

Mod. 50. 60. 141. 612.

But the possession which bears an ejectment or gives a title under the Stat. is an adverse possession only. If not

Exp. 283.

2 Bac. 177. 2 Lalk 513. adverse the Stat. does not run: ex gr. one joint tenant a Tenant in com. is in sole possession for 20 yrs. no bar to the other. So if mortgage remains no possession as mortgagor
La. 140. Lalk 285. In these cases there is no presumption of abandonment.
5 Ann. 2005. Co. Litt.
1796

Ejectment & Disseisin

2 R. 152.
 Esp. 434
 5 Binn. 2602
 Co. Litt. 178^c

If therefore one joint tenant or tenant in com. endeavours to hold the whole estate by possession he must prove an ouster & adverse possession: See his parent's case of his companion

Esp. 434.
 Comf. 217.

But it has shall be deemed an adverse possession in such case is a proper question to be left to the Jury who may presume an ouster from great length of sole possession

Esp. 435.
 Bull. 103.

(Wm 68-51092)

If the party in possession claims under the party out there is no title acquired by the possessor - not adverse the owner is not barred - ex. gr. But at will in possession 20 yrs. alone is not barred -

Ref. 435. Bull. 103
 1 Roll. 689.

(And where adverse possession is relied on by the Deft there should be some proof of actual ouster, the presumption of evidence of the fact arising from circumstances may go to the Jury - ex. gr. Tnt declaring that he holds under a stranger -

Ref. 435. 1 Roll. 689.
 Lid. Rv.

But it has been held that the tenant having taken a lease from a stranger is no evidence of adverse possession unless the latter has actually made an entry -

Ref. 435. Long 600.
 3 Binn. 1137. 1 Roll. 451.
 Bull. 103.
 2 Binn. 174. 1 Binn. 279. 1 Binn. 233.
 1 Binn. 232. 3 Binn. 218. 1 Roll. 226.

If the act is founded upon a clause in a lease giving a right of re entry for non payment of rent the actual entry is not necessary - Confession of lease - entry & ouster is to be made by the Plff - the Doubt -

Dry. 467. Ref. 468. 150.
 3 Binn. 1897. Bull. 103.
 Pl. 1886. 1 Roll. 244.

And the last rule is good where an entry is necessary to the Jury 467. Ref. 468. 150. complete the Plff's title - even when necessary to rebut Deft's title or to avoid a fine - here actual entry is necessary - In the former case the right accrues upon the act, event or contingency in the other upon the entry -

Ejectment & Disseisin -

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Doug. 21.
Exp. 435-6.

Mortgagee may maintain this act either before or after the day of payment - not only ag^t mortgagor but mortgagor's lease also, as well as ag^t a stranger under "Mortgages"

Exp. 435

Doug. 23.

269. -

"Mortgages"

But if lands leased are afterwards mortgaged, mortgagee cannot evict the lessee, his is the elder title - But in Eng. mortgagee is allowed in such case to proceed ag^t lessee by ejectment if he has given notice to the latter before act^d. But that he does not intend to disturb his premises but merely to "Mortgages" secure the rent.

Reg. ca. ch. 323. Exp. 458.
Exp. 435-6.
Dow. 11. 24-15.
1 Kim. 187. 2 do. 30.
159. 4th ed 38

So Mortgagee may recover in Ejectment & the mortgage money has been paid, if it was not paid at any; for he has the legal title - 1502 758 reg. 613. "Mortgages"

8 P. R. 2. 122.

But. 96. Doug. 23.

15 P. R. 760. 2 do.

684.

and it is a gen^l rule that the person in whom the legal estate is shall recover in ejectⁿ & tho the equitable interest may be in another, or in the Def^t himself -

Comp. 473. 1797.

Doug. 22. 695. 747.

12 R. 622. 735.

2 do. 695-6. 14. 16.

334. 447. 732.

327. 663. 8 do. 516.

3 do. 5. 11. 684. 458.

In some modern cases however C^t of Law have somewhat relaxed the rule & taken notice of trusts or equitable rights, under special circumstances. The principle of these cases has however been questioned. Kin. 778.

But. 110. Exp. 155.

In gen^l Def^t must recover by the strength of his own title - of course a recovery may be defeated by proving the title in a third person. But this can't be done when Def^t title is derived from Def^t: or when Def^t holds under title derived from Def^t. In both the cases the doctrine of estoppels applies. ex. gr. Mortgagee v. Mortg^{or} - & Mortgagee v. his own lessee

18 P. R. 740.
7 do. 489.
Exp. 457.
But. 110.

Ejectment & Disseisin

Upon the same principle of B claiming under title from A, leaves to C, in ejectment by A of C, the latter cannot dispute A's title.

Exp. 436. 70. Com. 288. Devisee of a term may maintain ejectment but not in Con. till Ex^t has assented to it. The legal title being in the Ex^t. In the Ex^t assent necessary in con. action for legacies always lie in our Ct of com Law, tho if the legacy is not specific, distribution is first necessary. In the legacy of pecuniary.

Exp. 437. But when a freehold is devised, devisee may recover it immediately on Testator's death. No assent necessary, Ex^t has no concern with it & the heir's title is gone.

Exp. 437. Assignee of a bankrupt may maintain the action for lands which belonged to him.

So of Ejectment or disseisin in Con. (Case of Boston or Adam 1805.)

Exp. 438. 400. 215. The Committee of a Lunatic cannot maintain ejectment for the lands of the Lunatic. It should be in the latter's name. Bull. 16. 2 Will. 130. for the title is in him, committee cannot make the necessary demise being only bailiff or agent.

In con. action must be in the name of the Lunatic suing by his conservator.

Exp. 439. 4 Co. 94. An Ex^t may have the action for an assent within of Testator or of himself where Testator was lame for years. it being a chattel interest. So of an administrator.

2 Vent. 20. Exp. 434.

3 Ld. 13.

Ejectment & Dissuissin

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But if one is deprived of real estate & dies, the right of action is in the heir. In Com the remedy is by action of Dissuissin

Cap. 4. 59. & 9. 12. 300. An alien cannot maintain this action. For he
2 Bl. 249. 244. 245. cannot hold lands - That is some of the States may,
Co. Litt. 3. 8. 2. 129. -
1 Bl. 6. 8. 2. 129. 98. this rule -
7 Bl. 16. -

A femeal may maintain this action against
3 Bl. 157. 240. 99. person himself, the former having the present right of
proven - Case 1 bailm^t contra vide "Bailm^t 24"

In Com. if several tenants come join in the action
of Dissuissin, a nonsuit of one will not bar the rest. As a
2 Linn. 445. severance - So if a release by one to the Defor. The others
may still proceed for their shares.

Of the Pleadings.

Bul. 105 The declaration should state Plff's title as it is, & should
Exp. 444. 59. show a subsisting title at the time of the act but if he has no
1 Bl. 510. title at that time, he has regularly no right of recovery.
3 Bl. 271. -
42 Bl. 105. title at that time, he has regularly no right of recovery.

But it is not necessary in the Com. act to state the
Plff's entry on a day certain - suff^t to set out his title.
i.e. the demise, & aver that he afterwards entered -
Exp. 445. For so are the precedents

In Com. not neces^y to state an entry by Plff - suff^t to aver
that at such a time he was seized or possessed as the case may require
Cap. 445. seized of a freehold, possessed of a term for years - the action
1 Bla. 7. should be laid as subsequent to the accruing of Plff's title - seems
Bul. 105. no cause of action
Exp. 445. 96.

Pleadings in Ejectment.

The particular day of the ouster need not be stated, i.e. no particular day need be stated - suppt of the ouster appears in the declaration to have happened after Plff's title accrued & before the suit brought.

2 Mac 188. 2 Ld. R. 1470
Comp. 350. Cro. Eliz. 399. in the declaration that the Plff may know of what he is to deliver possession on the writ of Habere Facias possessionem
Cro. Car. 271. 3. Salk 834
909. 1 Burr. 630.
17 R. 11. 5 Burr. 2642.
1 East 441. 3 Wils. 221.
Since the declaration is in - Ld. R. 191.

Comp. 850.
Comp. 248. 1 Burr. 629.
H. 71. 1063. — Great precision was anciently necessary, but the rule is now much relaxed: for the reason of the Plff is to show the land to the Plff at his peril.

In Con. the subject is usually described by a designation of the town & in which & of the boundaries of the land, together with a statement of the exact or estimated quantity. The quality or kind of land is not mentioned —

In Eng. the boundaries are not given, but the parish, in which the kind of land (as arable, meadow &c.) & the quantity, i.e. some certain quantity, are required
2 Wils. 23. —
Ld. R. 246. 2 Wils. 276.
7 R. 333. 5. 11 Co. 55.
Butt. 109. Salk. 254. 12 R. 275. to be designated. If laid in a wrong parish, Plff can't maintain the actt comb. So in Con. suppose Plff laid in a wrong town.
2 East 497. 9. 501. 2.

Comp. 547. Ld. R. 13.
2 Roll. 734. 3 Lev. 333.
Comp. 280. — But Plff is not bound to declare for the exact quantity that he is entitled to recover; for he may sue for a certain quantity & recover so much only as he proves or title to —

Pleadings & Evidence in Ejectment

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Exp. 447.
1 Burr. 326. But he can recover no more than he declares for;
tho he may recover less — So in personal actions.

So if he declares for a longer term than he then he may
Exp. 447-8. recover; for the question is whether he has the present right to the
Oult. 108. subject sued for.

Exp. 453. 11 Mod. 220. Tho the Defor. in Ouy. has confessed lease, entry & ouster,
Bul. 10. he may still deny that he is in possession — If Plff can't prove it
7 S.R. 327. he must be nonsuited — In Ouy. also Plff must prove Defor's possession.

3 Pl. 205. The gentleness in disseisin is no wrong or disseisin
do. 2 Pl. 9 & 10. In Ejectⁿ not quilty. Judges' on a plea of title in resp.
7 S.R. 304. is no bar to an act of ejectment.
Hill. 395.

Of the Evidence.

Exp. 445. The Plff in Ejectⁿ must recover by the strength of his
4 Burr. 2484. own title not by the weakness of the Defor. Good defence
2 S.R. 749. to prove the title in a stranger.
4 do. 682.

But the title proved in a third person must be a
good & subsisting title or it is no defence — ex. gr. Defor.
Exp. 456-7. produces an old lease to a stranger, not suff^t unless he
Bul. 110. proves possession under it within 20 years. a supposed title
is not suff^t —

When a lease is void or voidable possession may be
recovered ag^t lessee by this act — But it often happens
that Plff destroys his right of recovery by some act affirming
the lease or waiving his rights — If the lease is void no
act of Plff's will affirm it — ex. gr. Let for life alive in fee it
is void, acceptance of rent by landlord does not set it up —
Dow. 50.
Exp. 444.
Comp. 482.

Evidence, Verdict & Judgement in Ejectment.

But if the lease is only voidable, there may be an implied confirmation of it, by the acts of the lessor of the diff. &c.

lease on condition that if lessee assigns with lessor's consent, the latter may reenter - This is only void - able, not ipso facto void; for some act of the lessor

is necessary to show that he takes advantage of the condition -

Hence acceptance of rent after notice of the forfeiture is a confirmation of the assignment in a manner of the condition.

Exp. 465.
Exp. 467. Co. Litt. 241.
3 Co. 64. Comp. 803.
L83 -

of the Verdict, Judgement &c

The diff. in this act may recover according to the title which he proves, the diff. from that laid in the declaration; ex gr. Where leasing title for five years only he declares for seven. So if he declares for a certain number of acres & proves title to a less number only; he shall recover the latter. So if he declares for several things (as a house, & land) he may recover one & not the other, & tho the declaration should be ill as to one, it may be good & judgment rendered for the other -

Exp. 490. 497.
Comp. 280.
2 Bac. 177.

bro. Polley 186.
Exp. 490.

If the diff. declares for land only, he will recover with the land all the buildings upon it - They being included with the word "Land" -

Exp. 491.
Dy. 47^a
Co. Litt. 4. 2 Bl. 1718

Verdict & Judgement in Ejectment ¹⁰⁵

Est. 492.

Leik. 258.

2 Bac. 178-9.

If Plff recovers Judgmt he has a writ of Habere Fac. pos. under which the Plff puts him in possession & turns out all others.

2 Bac. 179.

5 Co. 91⁴

In the execution of this writ the Plff may break the doors of a dwelling house, if it is necessary. As when a house is recovered, the writ cannot otherwise be executed, if he is denied admittance. vide "Deed. on Land" & "Plff"

Ant. 73.

The Plff's Livery taken possession pending the suit, does not prevent his recovery - He may still have judgment for damages & costs - In Eng. it may indeed be pleaded in bar, but it is discretionary with the Co.

Est. 454.

Yelv. 180.

to admit the plea or not -

Est. 492. 7 L. 2, 328.

He. 1058. 2 Bac. 178.

Co. Litt. 385.

So if the term for which the act is had expires pending the suit, Plff has judgment for damages & costs -

2 Bac. 180.

1 Keb. 779.

If after Plff is put into possession, Defor turns him out, the former may have a new Lat. fa. pos. or an attachment agt him for a contempt. Less, if invited by a stranger.

5 Mac. 253-4

4 Burr 2224.

Le. 1106.

1 Maule 323.

Est. 493.

In the English act of ejectment if verdict is for the Defor. the Ct will seldom, if ever grant a new trial - For Plff. may bring a second action - no necessity for a new trial - But if verdict is for Plff. it may be readily obtained as in the other act to prevent the change of possession & possibly Defor's possession may be his only title in which case his bringing a new action might be of no avail -

Verdict & Judgement in Ejectment.

3 Bac. 253. Lalk 648-50
La. R. 514.

Formerly holden that a new Trial could not be granted in any case of ejectment. Not Law.

In Com. New trial is granted as in other actions - one Judgement being a Bar to another act between the parties as to the same title -

1. If the recovery for mesne profits -

2 Bac. 181.
Esp. 494.
2 M. 205.

The verdict in ejectment (when in Plff's favour) establishes his title; it follows that from the time of the ouster, the Defdt. has been a Trespasser.

Esp. 494. 2 M. 205.
2 Bac. 181.

After a recovery in Ejectment therefore, Plff may have an act of Trespas agt the Defdt. to recover damages for the latter's unjust possession - This is called Tresp. for the mesne profits. The damages recovered are the value of the land during Defdt's possession - Said with a continuance.

2 Bac. 187. n.
1 Kem. 105.

It is said that the Plff may if he so elects, bring a bill in Chancery for an account of the profits - But this is not usual.

3 M. 205.

The necessity of this second action arises from the circumstance that in ejectment the damages are nominal

2 Mac. 181. 2 Barnes 59
Carth. 205. -

But it has been holden that Plff. may recover for actual damages in ejectment. anciently full damages were recovered.

In Com. there is no doubt that full damages may be recovered in ejectment. Allowing this second act to seem impolitic. but it is established - sometimes full damages are recovered here in ejectment -

Verdict & Judgment in Ejectment

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In this second act it is not necessary for Plff to prove the entry of the Defdt. The recovery in ejectment is conclusive evidence of that fact.

The Plff is not however confined to the time of the lease & interest as laid in the declaration in ejectment. He may recover antecedent profits, if he can prove antecedent title & antecedent possession by Defdt.

But this distinction must be noted. If he sues only for the profits accrued since the lease, laid in the declaration in ejectment - the record in that act is conclusive in his favour but if he goes for antecedent profits, the Defdt. may as to them controvert his title - The record does not prove it -

Long or precedent occupier, the first record is evidence. His res enters alias acta. Plff must prove his title -

The Plff having regained possession, that possession is said to have relation to the time of the title occurring - This gives him a right to maintain Deed for the same profits.

This act however is within the provision of the Stat. of Limitations. The Defdt. may therefore protect himself, as to all the income profits, except what have accrued within 6 yrs. in Eng. or 3 in Con.

Suppose Plff in Con goes for full damages in ejectment. Can Defdt avail himself of the Stat. as to the amount of damages?

In Eng. the act may be brought either in the name of the nominal Plff or of the owner of the title, and if the nominal Plff releases the act he is guilty of a contempt.

Verdict & Judgment in Ejectment

The in common cases are that in common
cannot maintain trespass against his companion
yet after a recovery in ejectment he may

Coop. 495.

2 Wils. 115.

Litt. T. sec 323 corollary

"Parties in possession of the former —

2 Brame 268.

In the action for mesne profits
2 Bae 481 n. Rep. 408. the trespass is laid with a continuance —
vide id. trespass

Waste

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"Waste" is any spoil or destruction in Houses, Lands, trees or other corporeal hereditaments, to the dishonour of him who has the remainder or reversion in fee simply, or fee tail. —

2 M. 281.
Co. Litt. 53.
5 Bac. 455.
3 M. 229.

There seems formerly to have been a distinction between waste & destruction, not attended to now —
1 Freeman's Hist. Com. L. 380.

There are two kinds of Waste — Voluntary & Permissive — voluntary is that which is occasioned by positive acts of spoil or destruction; an offence of commission — Permissive is that which happens thro' negligence, an offence of omission

Co. Litt. 53.
2 M. 281.
5 Com. 677.
5 Bac. 457.

5 Bac. 457. 44 281. Govern and by lease not to do any waste is broken by permissive waste; words. ex. gr. Condition that if Lessee do any waste, lessor may re-enter — House falls for want of repairs — Holder that lessor might re-enter

2 Inst. 145.

What amounts to waste & what does not.

2 M. 281. 2. I get whatever works a lasting injury to the inheritance is waste —

5 Bac. 457.

1. In the Houses or Buildings — demolishing a House is waste voluntary.

5 Bac. 281.
Co. Litt. 53.
5 Com. 677.

2 M. 28. 14 64. In removing boards, timber, floors, or any thing once fixed to the freehold of the house — ex. gr. a door or window — a hearth or shelf &c. Co. Litt. 53. 58. 329. 2 Inst. 145
These are voluntary —

Waste

5 Nov 1889. *Redwood* in boxes of things annexed to the records by
19th 4 Nov 89.
5 Nov. 1899. *Thimble*, in waste, ed. gr. *Worms* - a *leech* & for this
Nov 1899 - *parcel* of the *building* - "no *leaving*"

The in gen^l nothing is waste except what was
an injury to the freelots, yet changing the structure
& use of a building by force is waste, the advantageous

5 Dec. 457.
2 Dec. 814. 1 Low 30p. 11. To the lesson - ex gr converting a corn mill into a
2 Low 078.
* Mod. 94.
2 H. 282.

4 Conn. 647.
 U.S. L. 508.
 5 Mass. 451.
 2 N.H. 815.
 Suffering a house & to decay for want of necessary
 repairs is waste in the last. Premises, 1. For he is
 bound at his peril to keep the house from ~~decaying~~
 under exemption by covenant. Lessee is liable in
 the last case, the there is no timber on the land demised.
 He at his peril - Lessee if error he has cut all the
 timber since the demise -
 5 Mass. 487. Conn. 681.

4-Pac. 451.2 Rule 815. Building a new House on the land secured where
 Robt 234. Co Pa. 572 There was none before is not waste - Genl. - Co. 560. 677.
 But once may not take Lessor's timber or other
 material to build or repair it - It must be altogether
 Robt 234.
 5-Pac. 466. at his own charge -

Sept 23^d 58th Sept. suffers it to decay in its quality of manure - For it become
too like 58th - parcel of the Freehold -

Waste

111

Hot 234 If lessor builds a new House after the demise, Lessee is not bound to repair, & is not liable in waste for its decay, for it was not part of the thing demised —

5 Bar. 461. If a House leased was uncovered at the common Co. Litt. 59^a — ment of the lease, its decay for want of covering is 5 Com. 678. not waste in Lessee —
Dover 98.

At Com Law the burning of a House thro negligence or by accident was waste in the Tenant. He is never excused in any, in case of accidental burning by third persons.

5 Com. 681. The destruction of a House by the act of God
5 Bar. 404 (as by lightning &c) or by public enemies is not
1194 — waste in the Tenant.
2 Inst. 303
Co. Litt. 53^a

But if the House in the last case be left standing, the Tenant must repair it in a 'convenient' or 'reasonable' time otherwise if it suffer further lasting injury for want of repairs, he is guilty of waste —

5 Bar. 461. If the Tenant commits or suffers waste in Houses, yet if he repairs them before act^d but no recovery can be had of him — But he must proceed the subsequent repairs specially — But he may not take lessor's timber to repair after actually suffering waste
Co. Litt. 53^a
5 Bar. 404
Sent — at where

2. In Lands; digging up & carrying away the soil by the Tenant is waste — So suffering a wall to be ruinous

5 Bar. 458. & 459. in consequence of which the Land is injured by the influx of water —
58^a 2 Roll. 116 5 Com.
178. Mod. 62. 73.

Waste

5 Bac. 458.
Co. Litt. 53^d

Even if the wall be suddenly swept away by a torrent or
tempest - tho if the Lord does not repair it in convenient
time, & further lasting injury happens, it is waste.

5 Bac. 458.
2 Roll. 814

All bad husbandry is not waste - as if Lord
suffers arable land thus neglected to be overgrown with
thorns - this is not waste -

But great conversion of one species of land into
another is waste - ex. gr. Arable into woodland & c converso.
meadow into arable & c converso - For it changes not only
the course of husbandry, but the evidence of the identity of
the estate - Thus as to this rule in law. The custom is
I believe, for tenants to change arable & pasture into
meadow & c converso, at pleasure - perhaps no change
here would be deemed waste, unless actually & lastingly
injurious -

5 Com. 678-9.
Co. Litt. 53^d 5 Co. 12.
2 Mod. 193. 2 Pl. 232.
Holt 234. 5 Bac. 460.
5 Com. 679. Co. Litt. 53^d
Hes. R. 2 Pl. 282.
5 Bac. 480

If tenant for life be open new mines &c on the land.
He is guilty of waste; unless the mines themselves were
demised -

2 Pl. 281. 4 Co. 62.
5 Bac. 459 Co. Litt. 53^d
54^d

But digging in mines open at the time of the demise is
not waste: tho the lease does not mention mines -

5 Com. 679. 4 Co. 62.
Co. Litt. 53^d
5 Bac. 459. 2 Roll. 815.

3^d In Wright If tenant for life &c. cuts down timber trees
except in special cases infra He is guilty of waste -
timber being part of the inheritance. So if he does any act
in consequence of which timber decays - ex. gr. topping
or toppling - So if destroyed thro his negligence -

1 Roll. 649. By timber trees are meant trees fit to be used in building;
2 Pl. 281.
5 Mac 459. so that all trees are not timber. (Johnson's Dictionary) -

5 Com. 679. Cutting down shade trees near the house (tho not timber)
Co. Litt. 53^a is waste - called by Coke "destruction".
Holt 219.

2 Pl. 281. Dy. 65^a As to what particular kind of trees fall within this
Co. Litt. 53^a = 2 Roll.
8 Pl. 1. 12. 5 Mac 459 Description (wide margin) - Oak, ash & elm are timber trees
5 Com 679. ^{Mod. 812.} the realm, & where there are scarce others are such by
Co. Litt. 53^a 2 Roll.
note made - cutting.

2 Pl. 281-2. Under wood that may cut at pleasure, if it be at a
2 Roll. 659. 817.
8 Pl. 146. proper season.

Tenant is entitled of course-right (unless restrained by express
covenant) to cut wood growing on the Land, as is necessary,

2 Pl. 35. 222. For fuel, for repairing houses or fences & for making
Co. Litt. 41. 5 Mac.
400-1. 2 Pl. 17. & repairing implements of husbandry. Cutting this is not
59. Co. Litt. 6. 624 waste - yet if he suffers a house to become ruinous for
want of repairs, he cannot take less or timber to repair
5 Mac 1166. it - this is waste.
Co. Litt. 53^a

5 Com. 679. He is guilty of waste if he cuts timber to make houses
Co. Litt. 53^a fences or where there were none before
2 Roll. 822.

5 Com 679. So if he cuts for repairs which are not necessary,
2 Roll. 822. or the want of which is occasioned by his own fault.
Co. Litt. 53^a

5 Com 679. So if having cut timber for necessary repairs, he sells
Co. Litt. 53^a it & appropriates the assets to the making of repairs
5 Mac 1266. He is guilty of waste -

Waste

Tenant is entitled to suffer timber for necessary repairs, even tho he has covenanted to repair at his own expense or charge - for the right cannot be taken away except by express covenant -

5 Com. 680.
Mod. 23.

In many cases the Tenant may cut timber for repairs, tho not compellable to repair - tho he has covenanted to repair - for the policy of the Law favours the support of dwellings & appurtenances.

5 Com. 680.
Geo. Litt. 54^b

So tho the lease be "without impeachment &c" - If the house was ruinous when the Tenant entered, in which case he is not liable for its decay -

5 Com. 680.
Geo. Litt. 54^b.
2 Roll. 823. 822.

Destroying fruit trees in a garden or orchard is waste - less if they grow upon other grounds - called by look "destination" -

5 Bac. 481.
Geo. Litt. 53^a

Decided in law, that Tenant in possession of waste land who had cut timber for sale, built a saw mill & was not guilty of waste - But not so as a lease of charge will prevent unreasonable waste in such by injunction -

Rules applying to waste in general -

5 Bac. 461.
5 Com. 678.

Breaking down corn fences not itself waste, tho its consequence may be - But destroying the fence of a park or suffering it to decay so that the deer escape is waste.

5 Com. 680. 11 Mod. 641. Geo. Litt. 54^a Tenant not liable for waste, unless the value amounts to 100 sterling - De minimis non curat Lex.

2 Roll. 824. 2 Roll. 228.
Trenk Linn 24.

No person can be guilty of waste if the place is ruinous

It is committed in no part of the demise, or Land holden by
 5 Leon. 580. the Lessee for life or years. &c. &c. Lease of a Farm, except a
 Dy. 19^a
 Cro. E. 590. piece of woodlands. That cuts the wood - not guilty of waste -

But if there be a proviso, that lessor may cut the
 5 Leon. 580. timber; Lessee is guilty of waste if he cuts it. For it is
 Dy. 19^a - a covenant, not an exception as to the subject leased.
 Cro. E. 590. 2 Inst. 302. Yet if tenant assigns, excepting the wood or trees, & the
 Cro. E. 17, 589. assignee cuts the wood, he is guilty of waste - for as to
 1 Leon. 42. the lessor, it is part or parcel of the demise & the exception
 2 Roll. 454 is void -

5 Mod. 581. Nor. 327. If a lease is made with a clause "with impeachment
 2 Inst. 146. 2 Roll. 335. of waste" tenant is not liable for waste. (Interference of 6thly)
 Cro. Jac. 216. 2 Roll. 230. But this exception can be created only by deed

1 Inst. 126.
 5 Leon. 581.

(And to constitute a lease to the effect of waste it must in
 5 Leon. 581. the same deed which contains the lease alter it into a covenant)

1 Roll. 183.

If tenant in tail leases "with impeachment" & the clause
 1 Roll. 183. does not bind his issue, tho the latter confirm the lease
 5 Leon. 581. by accepting rent -

5 Leon. 581.

2 Roll. 322.

Mod. 9.

That is not guilty, if the injury is occasioned directly
 or indirectly by the lessor - ex. gr. If he destroys a fence in
 consequence of which trees are destroyed -

Mod. 7.

5 Leon. 581.

If lessor cuts the timber not leaving enough
 for repairs -

So if the injury was occasioned by the act of God or of public enemies, tho in this case he must repair in convenient time, if the subject matter remain & be capable of repairs.

Who may maintain this action of Waste.

W. 204. 105. 121. 12

Co. Litt. 53^b 285^a

5 Com. 673. 3 Pl. 227.

5 Bac. 468. 2 Roll. 825.

W. 210. 2 Inst. 302.

The old com. Law part of prohibition to restrain waste is taken away by the Stat of Westminster 2. Waste being to the disherison of the party injured the act, must be set by him who has the immediate reversion & is in fee simple or tail -

The reversion or remainder in the Fee, must be immediate, i.e. there must be no intervening freehold remains - If there is the reversioner & is in fee simple he cannot maintain the act. For if he could the recovery would destroy the intermediate estate. e.g. Case to A for life remainder to B for life, remainder to C in fee. Here if C could recover agt A during B's life, C's entry for the forfeiture would defeat B's remainder - it being freehold -

5 Com. 674. 5 Bac. 468. 78
Co. Litt. 54^a 54^b 77.

Lev. Lac. 688.

2 Pl. 187. 1 Com. 58.

Mod. 8. 2 Inst. 301.

2 Roll. 827.

But if the intermediate remainder in B in the case were for years only, C might maintain the act agt A during B's life - for B's remainder being a chattel interest does not require the

246. 166. continuance of the first particular estate to support it,
2 Inst. 301. but may take effect after C's entry on A's death -

If after the commencement of the lease for life,
reversioner grants the reversion for years to another,
5 Bona. 674
Co Litt. 54. this is not a remainder, & reversioner can have
5 Bac. 477. no act of waste during the second term -

If an intermediate remainder for life is limited on
contingency & the tenant commits waste before the contin-
-gency happens, the reversioner & in fee may maintain
5 Leon. 879. the act - for here the recovery does not divest the
Allyn 82. remainder, but prevents it from vesting -

So if a lease for life be made to A, remainder
to B for life &c - the reversioner &c may have
5 Leon. 879. the act during the first limitation for both estates
2 Inst. 301. Im. 51. -
Cro. Jac. 188. are in A -

Suppose if B has the immediate inheritance at
the time of the act but, the L had not at the time,
5 Leon. 879. of the waste committed, ex. gr. lease to A for life &c,
5 Co. 76. & B for life - A commits waste, afterwards
2d Rule 829. remainder to B for life - A commits waste, afterwards
Mod. 387. B dies or surrenders - reversioner &c may have the
Allyn 82. act agt A -
Jones 51.

If tenant in com. in fee &c lease his part to him &c
but for life or years, he may have the action,

Waste—

Com. 673. dec. 77. & recover a moiety of the place & damages—
 L. by Stat. Westm. 2^d one tenant in com. of the
 inheritance may leave this act as his fellow for
 waste committed in the estate tho no lease (ut supra)
 The equity of the Stat. extends to joint Tenants not
 3 Pl. 227. 2 Co. R. 3. 194
 2 Inst. 403-4. to coparceners, for they might compel partition
 at Com. Law—

He who has the inheritance may join in
 the act one who has a smaller interest—e.g. q. s.
 Husband wife, where the reversion is to them & the heirs
 of the husband—So if the reversion is in A & B &
 the heirs of B—the wife may join in the first case—
 5 Com. 673. —
 2 Roll. 225. —
 Co. Litt. 53th 12th c. —
 if in the second

les. Rec. 658.
 5 Co. 119 —
 les. Litt. 283^a
 2 Jac. 408.
 2 Inst. 200.
 If lease for years commit waste & his term
 expires before act^d but, yet lessor may have an
 act^d of waste for the damages (tolls) tho he cannot
 recover the place wasted.

Off cannot maintain the act unless he has
 the same estate continuing in him which he
 had when the waste was committed—e.g.
 Reversioner in fee, after waste committed, grants
 the reversion to another & then takes back the
 same estate—his action is gone, for his right of

2 Roll. 825.

5 Com. 674 - action was devised by the grant & re purchasing
 5 Bac. 408.
 Co. Loh. 52556 does not reveal it - the priority of estate is destroyed

At Com Law, grantor of a reversion in fee re
 could not maintain this act - the non commission
 of waste being a condition, to which he is neither
 Carter 25. 2 M. 158. 8. partly nor piny. By Stat 32 Hen 8. he may
 Mod. 876
 Rev. Law. 145. after notice of the grant -

Ston. 674. 2 M. 282. 3 At Com Law waste lay at guard in Chivalry
 2 Inst. 145. 199. 300. 3 M. 216.
 1 Brash 121. but in Domesday & that by the curtesy only
 2 Inst. 54. 5 Bac. 469. 5 M. 68. As to ten' by the curtesy, opinions are various -
 1 M. 283. 2 do. 336. 2 do. 336.
 2 M. 283. 5 do. 195. but by the better opinion he was liable - But
 2 Inst. 299. 5 Bac. 469. com' ten' for life or years was not -
 5 Com. 674. 2m
 Root 244 ten' by the curtesy holden to be liable in Com.

The reason of the diversity at Com Law,
 between guard re & lease re was that the
 estate of the former being created by Law, the
 2 M. 283. Law gave this remedy at them, but as the estates
 5 Bac. 469. of the latter were created by the owner of the
 inheritance he might have provided at waste.
 But by Stat. of Marlbridge 5 Hen. 3 & Gloucester
 2 M. 284. 3 do. 6 Dowd. the act is extended at all ten' for
 225. 5 Bac. 469. life or years - at him that holds by Law of
 5 Com. 674 -
 3 East. 58. him or otherwise for term of life or term of years -

Waste

5 Leon. 74. It is therefore at law for life or years since
2 Roll. 526. these state.
5 Bac. 470.

5 Leon. 675. Co. Litt. 54. Is at the assignee of a tenant for life & for waste
Case Pl. 683. 5 Bac. 473 done after assignment — 2 Inst. 302. The act in this
5 Bac. 473. Co. Litt. 54. Case cannot be supported at the original tenant for life.
For it is a good rule that the act must be at him
who committed or this negligence suffered the
waste —
5 Leon. 675. —
Co. Litt. 54th —

But if tenant in Dower or by the Curtesy assigns
& assignee commit waste, act lies for the heir
at tenant in dower be for this were liable for
waste at common Law — but as no act of waste

5 Bac. 472. 2 Inst. 302.
5 Leon. 676. Co. Litt. 54th lay at common Law at an assignee, it lay of
necessity at them, even after they had assigned —

And their liability at common Law is not removed by
the Statute! where! Indeed the heir in the last case
cannot sue the assignee, for he is not tenant in
dower & the requisite privity is wanted —

But if tenant by the Curtesy & assigns & the assignee
commit waste & the heir grants away his reversion, the

5 Bac. 742. Co. Litt. 54th
316th 2 Inst. 301.
3 Co. 23rd
H. N. B. 56. — grantor of the reversion can sue the assignee in waste
shin only, for there is privity of estate between them & tenant
by the curtesy & can hold as such of none but the heir —

Waste

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11 Com. 375. Co. Litt. 54^o
2 Inst. 301.

The act^r lies ag^t an occupant, common or special.

11 Com. 375. 2 Inst. 302.

3 mod. 93. - So ag^t an Ex^r de son ten^t - for waste committed by himself.

2 Roll. 224. If ten^t for life he commit waste & then assigns, he remains

11 Com. 375. 2 Inst. 302.

liable -

If waste is committed by a stranger or Land^r in
possession of ten^t for life or years, the ten^t is liable to the

5 Brac. 474. 4 Inst. 280.

2 Inst. 301. 5 Com.

375. Co. Litt. 54^o

2 Roll. 224.

act^r. So if ten^t in dower or by courtesy, & the ten^t has
trespass ag^t the stranger. But negligent wrong doer being
a stranger cannot be guilty of waste. & hence he cannot sue

5 Brac. 105-7.

3 Inst. 229.

in trespass not having possession but he may sue in case ten^t
same rule tho the ten^t be an Ex^r or joint tenant.

Co. Litt. 54^o 11 Com. 375.

2 Inst. 301. 5 Brac. 475

2 Roll. 221. - So if stranger disposses ten^t & then commits waste

11 Com. 375. 2 Roll. 228. 5 Com. 375.

Mat. 4. 12. 13. Bract. 429.

Contra -

If ten^t for life being committed waste dies,
his Ex^r or Adm^r is not liable to this act^r. So if ten^t in

5 Com. 376.

2 Inst. 302

Dower or by courtesy - is being a ten^t So if ten^t for years
tho the term goes to the Ex^r he - It lies not ag^t ten^t

2 H. 125. 283.

Co. Litt. 275. 2 Roll.

325. 5 Com. 375.

2 Inst. 302.

in Soil after possibility of issue he for his estate being in
its creation an inheritance is not within the Stat. of waste.

For ag^t a ten^t at will - for the commission of waste ipso facto

2 H. 146.

determines the estate - besides he is not within the Stat. being

11 Com. 375. 5 Brac. 475.

Co. B. 777. 284

neither ten^t for life nor years - liable to trespass -

2 H. 125. 283. 11 Com.

375. 2 Inst. 302.

Novo ten^t for life is "with impeachment" & exempted by Stat.

2 Roll. 224.

Novo ag^t his ten^t for years -

Waste

of the Recovery in this Action

244. 282. 2 Ind. 405. The 'Innkeeper' for waste as Com. Ten. & by Stat. of Marl.

(22 Hen. 3) was only single damages — But now by Stat.

244. 117. 2 Ind. 303 Stat. of Gloucester (2 Hen. 1.) Tent perfect treble damages &
5 Prae. 487. the place in which it — Since this Stat. the action is in

244. 225. 117. 118. Temp. a mixed act — realty & personally are recovered —

5 Prae. 487.

244. 284

If the land demanded be three acres & waste is committed in one only — one only is recovered — only the particular parts in which waste is committed are recovered, if they are easily separable from the other — e.g. a particular close or one particular part of it — locus of committee person as in a wood, field, &c — If committed in several rooms of a house, the whole is recovered — does perhaps, if one only which is easily separable from the rest — the Com. only single damages have been demanded & not the place wasted — Since it is not Stat. of Glouc. Com. in Com. ? Com. in Com. of Tent in house of waste land — By Stat. of Com. if Tent in house refers waste in houses, buildings, &c or refers Com. to decay the County let may on application by the heir deliver so much of the house estate to him for so long a term as may be useful in their judgment to enable him to make the necessary repairs out of the rents & profits, unless the tent in house will give good security for clearing the estate in subject repair —

5 Prae. 487.

2 Ind. 305. 244. 284

244.

244. 284. 2 Ind. 304

see. Stat. 54.

Stat. 147

of Estates in Possession, Remainder & Reversion

This subject depends on a few general rules or principles - my object then will be to give an elementary treatise on it -

In the view now to be taken, regard will be had not to the quantity of Interest in the owner, but to the time of enjoyment

Estates under this view of the subject are of two kinds, in Possession & in Expectancy - Expectancies are divided into

2 Bk. 183. two kinds - 1st Remainders created by the act of the parties -

2^d Reversions created by operation of Law -

Estates in possession i.e. estate executed, hardly need a definition. Estate in the books means an estate in possession of course, unless the contrary appears -

I. An estate in possession is a present interest not depending on any subsequent contingency & accompanied with a right of present enjoyment. This definition is imperfect. It says it is one by which a present interest resides in the owner - not depending on a subsequent contingency - This applies also to a Reversion but the right of enjoyment is deferred & this is the ground of the distinction

The rules given by Lord Bacon all apply to estates in possession

II. of Estate in Possession & in Reversion - This is an estate limited to take effect & be enjoyed after another estate in the same subject matter is determined, as tenements - ex gr. an estate granted ~~that~~ that in fee to a person for years & after the determination of the term to his heirs this is an estate in Reversion

2 Bk. 189.
Don. Rev. 239.
Term. 1.

Remainders -

A is called Particular trust & B remainder man

Co. Litt. 147

2 Bl. 164

The estate that precedes the remainder is called the Particular estate, & the estate that follows it, the Remainder

2 Bl. 164

Modest 185

These two interests are one estate, i.e. they compose only one estate in fee. They are each of them component parts of the estate in fee which embraces the whole Estate that can be had or enjoyed in any real property or subject. All these then constitute but one whole, according to the mathematical principle that all the parts are equal to the whole -

2 Bl. 166. How 29

Wright 239.

It follows that no remainder can be limited on or after a fee simple; for the fee exhausts the whole interest so that there can be no residuary interest. A fee is imposed never to determine how the owner shall work his

It may occur that a fee or remainder may be limited over after a fee by executory devise - This is not however true - for there one fee is substituted for another in a certain event, it is not additional to an entire fee simple, for this is physically impossible -

How 262

How 136-139, 140

The most proper word to create a Remainder is "Remainder" but the appropriate word - others however may be used -

Thus, one of the great maxims of Remainders -

Remainder -

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Particular Rules on this subject -

1st To create a Remainder there must be some particular precedent estate to that in Remainder - the precedent estate is called a particular estate - ex gr. So & for life

Co. Litt. 49.

How 25. 36

How D. 242

Remainder to him &c - Remainder is a relative term & implies that some other particular estate exists or that some part of the thing is previously disposed of -

An estate then created to commence in futuro with a particular estate is not a Remainder - not a remainder

2 Bl. 165

Particular estate, & remainder, are correlative terms: one cannot exist without the other -

2 Bl. 165

5 Co. 94

R 151

A freehold interest cannot at Common Law be created to commence in futuro. It must take effect immediately in present or in remainder. The reason is, because of record is necessary to create this estate - there is

Seame 144

an exception in the case of freehold rent -

The object of the last rule is to prevent the freehold from being in abeyance, which would fetter inheritance & would prevent the Tenant to the precise from recovering his right in a real action - so no real action could be brought - for he might create it to commence 999 years hence as well as on any moment - If this were the case, the ultimate purchase would be of little value as one could not be sold & thus avoid inheritance, he followed -

Seame 234

Remainders

i.e. sale would be better -

But the principal reason is the other one - e.g. a lease made for 150 yrs by a person not having a right - now the title could sub be tried by a real act - The House - real act are out of use in Westminster Hall almost as much as in law.

2 Pl. 166.

2 Moor 200

Livery of seisin I observed was necessary to create a freehold & in its mature operation immediately or not at all - this imports a present interest - i.e. the precise act of giving a present possess of a freehold & is an insuperable objection to commencing an estate in futuro implies a contradiction -

Suppose then a particular estate created & then livery of seisin or present possessⁿ is to be made to the particular tenant to support the remainder & this enables to, i.e. it operates to give effect to his Remainder - So the estate of Remainder commences in presentⁿ tho' to be enjoyed at a future time

2 Pl. 166-7-9.

A lease at will is so precarious an interest as not to be suff^d to support a remainder - Is not regarded as a part of the inheritance - This is the true reason - Pl. add. in the case of a freehold remainder entry to make livery with distress an estate at will I think otherwise - For the particular estate is created at the same time - Indeed that this is not the reason - appears from the circumstance that an estate at will will not support a remainder that can't ant to a freehold -

2 Pl. 151.

8 Co. 75

Dyer 18.

See Lib 28

2 B. & C. 415

Gross 58.

as there must be a particular estate to support a
Remainder it follows that if the particular estate is void
at its creation, there can be no remainder for there is
no particular estate. ex gr. an estate for life to a person
not in esse, remainder in fee to B. Here is no remainder.

And if the particular estate the good in its creation
is defeated before the remainder can vest, the remainder
must fail. Pl. gives the rule wrong. L. says it defeats
the remainder if it ever fails. I say it does not. If it may
ever vest when the other is determined. ex gr. Estate
to A for 10 years & after the expiration of 10 years Remainder
to B. Now if A forfeits his estate at the end of 4 years
this defeats the remainder because it cannot vest then.

But if limited to A for 10 years & after the determination
of that estate to B for life — here the destruction of A's estate
in 4 days only accelerates B's estate — for in these cases
the expiration of it by forfeiture, surrender, or the like
comes to the benefit of the Remainder man — to be sure there

2 B. & C. 189.

2 B. 154.

2 B. & C. 180-6-7.

Lease 20934-41.

- 61.

must be no chance — This rule applies in case of con-
tingent remainder but not to vested remainders they being
vested at the creation of the estate. Thus in the remainder
above on the giving of notice made to the particular tenant that
it is defeated by Grantor's entry for condition broken, the
vested remainder fails. See. ex. 2 B. 155-6. You can that
he calls a vested remainder in Pl. 154 —

Remainders.

2^d Gen^l rule is that the Remainder must commence or pass out of the grantor at the time of creating the particular estate. This needs explanation - The absolute or contingent right must then pass out of the grantor - Suppose an estate to A for life & remainder to B in fee absolutely - here the rule applies; B's remainder passes by livery of seisin made to A. But suppose an estate to A for life & remainder to B in fee on a certain contingency, here I think the contingent right to enjoy the estate don't go to the remainder man (unless the contingency happens, then it passes instantaneously from A & goes to B as a vested interest. So the rule applies only as to vested remainders.

Case D. 242-3.
2 Nov 1779.
2 Pl. 107.
Litt. 443. 671
Plow. 25.

That the interest don't pass to contingent remainder - man is certain, for 'tis settled that the interest limited continues in the grantor, till the contingency happens. So it will descend to the heir - The contingency be in multibus, i.e. nowhere -

Case H. 262

Term 27. 28-6.

261-

A Remainder cannot be limited on an estate already in use created beforehand. So be sure the interest remaining may be granted as a reversion & not as a remainder - If I should call it a remainder, still it would be a reversion. Indeed it seems they must both be created by the same instrument.

Leane. 228.

Remainders -

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3^d Rule is, the Remainder must vest in the grantee either during the continuance of the particular estate, or so instantly in which it determines, i.e. it must vest in interest not in possession. If it vests in interest it is safe -

Suppose an estate to be for life, Remainder to B in fee. B being alive - Remainder vests at the creation of the particular estate, not in possession but in interest -

So to A for life, remainder to B provided A returns from overseas in 5 years - A returns within that time & at the moment of his return his interest vests in possession within the rule -

So to A & B jointly their joint lives, remainder to the survivor - Here the remainder vests so instantly that one's life determines. Proceed it vests also in possession - tho that is not necessary - It never can vest in possession during the continuance of the particular estate. It follows that if it does not vest sub specie, the remainder must fail - ex. gr. estate to A for life, remainder to the eldest son of B, unborn. A dies before B has a son born - Here the remainder fails - For the two estates cannot be enjoyed in continuity - & from the nature of them being but one estate, both must be in use together & one is void to support the other -

Case 2. 213.

Re. 68. 158.

2 Nov 1772.

Remainders

How 25
2 Pl. 168
3 Co. 21

Indeed it may be void at its creation. Thus test for life, Remainder to B to take effect in 2 days after A's death; this is void in its creation —

resting in interest, vide - Same 233 & 237-240-1.

Remainders are of two kinds vested & contingent —

By a vested remainder is meant one vested in interest for after it vests in possession it is no longer a remainder but is converted from an estate in expectancy to one in possession. A remainder as implied ex vi termini imports expectancy.

Same. 1.
Case 238. 2 Pl. 168.
2 Wms. 175

A vested Remainder is one by which a present interest passes to the grantee to be enjoyed in future i.e. to take effect in possession at a future time. It carries with it a present fixed right of future enjoyment to A for years, remainder to B in fee. Here the estate is vested in interest.

A Contingent remainder (or executory remainder as it is sometimes called) is one by which no present interest passes to the grantee, but is to take effect upon a contingent or uncertain event, as the birth of a person. This is an uncertain event notwithstanding what Mr. Sugge who calls it a limitation to an uncertain person e.g. to A for life, remainder to B provided he returns from beyond sea before A's death, here at moment of birth remainder is vested.

Again - To A for life, remainder to the eldest unborn

Francis 334

7 Co. 20

Chalk 228

2 Bl. 169

2 Wood 191, 206

2 Bos. 250

1 Bos. 25

4 Mod. 282

son of B - this is contingent, but on the birth of a son during the life of A, the remainder vests in interest. Here a possibility clothed with an interest is descendible. The right to enjoy that property is possible -

Suppose an estate to A for life, remainder to B in fee - this is vested. But if to B after the death of A it is contingent, for A may perfect it. But to B after the determination of A's estate, is vested -

Assy. 251

Remainder to person unborn is contingent - at common Law, if the remainder were limited to the eldest of the particular issue, he can only be vested in interest in esse or at the time of the determination of the particular estate could not take - not in esse - Indeed at common Law he was deemed to be in esse for many years from his birth -

2 Bl. 169

2 Wood 100

2 Co. 51

Less by Stat. 3. (10 & 11.) For by these the remainder vests in a posthumous child in esse in esse.

Thus a remainder may be limited to one not in esse yet it must be limited to one who by common possibility may be in esse at or before the time when the particular estate determines -

Common possibility is distinguished from remote possibility, e.g. an estate to A for life, remainder to the heir of B. B being in esse is good - For he is possible to may die first & leave an heir - to be our nearest heirs in esse -

Remainders

Same 175. 2 The Law presumes every one will leave one heir!
 2 Geo. 5.
 Geo. 2. 166. 5. 78 To have one not two uncertainties in contemplation
 2 Bl. 109-110 of Law in such a case.

But a remainder to the eldest unborn son of B. his being unborn at the time is void in its creation 'tis a possibility, an possibility; for here the necessity that B should be born & there should die during the continuance of the particular estate.

Geo. 2. 25th 1722 To the eldest unborn son of the unborn
 166. 23. son of B is void -

To a remainder to an unborn person of a particular name is void in its creation - Thus to John the eldest unborn son of A is void - for there is too remote a possibility - for a son is first to be born & is then to be called John -

Same 177 on the same principle a remainder limited
 2 Geo. 5. to the happening of something unlawful is void - for 'tis a remote possibility in legal contemplation - eg. of

2 Bl. 176. Remainder to an unborn illegitimate, is void - I consider
 Same 175. 8 this as grounded on policy - 'tis impolitic to presume
 Geo. 2. 509. an unlawful act - The rule itself is arbitrary -
 Plow. 32

a limitation on failure of a preceding limitation is not of course contingent -

Plow. 2 250.

Remainders-

135

Is a Rule that a contingent Remainder of Freehold cannot be limited on any estate less than Freehold - The Freehold can't be in abeyance - I think the whole freehold don't pass out of the grantor - the Freehold, not the Freehold must pass. Reason is, there must be a vested Freehold somewhere. So that there may be a ten^t to the principle. It must then rest in the particular ten^t not remainder man for he is not in existence at the event has not happened

2 Pl. 171.
1 Ev. 181
R. 151
Mod = 139.

Since then it passes out of the grantor, & by the supposition it can't rest in the remainder man & must rest some where, it does rest in particular ten^t -

Devise to A for their lives & the life of the survivor but if B marries & has issue then after A's death to B & her heirs, if B die single with no heirs to B & her heirs, & B take a joint estate for life, with contingent remain^r in fee to each in the alternative -

Law. 725.

A contingent remainder may be defeated by the determination of the particular estate before the contingency happens - applicable to the 3^d gen^l rule as to death

2 Pl. 171.
Seame 241-8-82
-82-4-8-70-2.
1 Ev. 81, 1 Co. 68 195

alienation, surrender &c &c for the particular ten^t forfeits his estate while the remainder man is yet unborn -

But a determination of the more actual seisin of the particular ten^t does not of course defeat the contingent remainder for tho the particular ten^t should in fact be dissolved, the L^{or} or right to enter & his estate continues & so the remainder is supported -

Remainders

To prevent the destruction of the Remainder in such cases, the practice of appointing trustees to preserve contingent remainders has been adopted -

This arose in the time of the civil wars in Eng. to prevent the destruction of remainders by forfeiture. For instance
 ex. gr. to A for life & Remainder to B during life of A -
 remainder to C on unborn child -

2 Pl. 171. a note was given of his prospects by A, B having a vested remainder
 Co Litt. 373. 460. 51. takes the estate, till the death of A, or as the case may be,
 See also 21. 7. 8. 9. 10. 11. 12.
 152. 7. 20. 33. 112. 142 till the birth of a child. This depends on the limitation

The question whether a remainder is vested or contingent, does not of course depend on the probability, or improbability of its ever commencing in possession - but on the limitation: ex. gr. to A & heirs of his body, remainder to B, this is vested remainder - & yet it is not probable it will ever take effect - It is the uncertainty whether the remainder will ever vest in interest, not whether it will ever take effective possession that renders it contingent - But the nature of the limitation determines it & not the probability or possibility of the limitation being contingent then the remainder is contingent - Secus, not -

Remainders

again to it for life, Remain - to B is vested
 & yet it may be forfeited & so the remainder destroyed
 Wood - 172.
 134. 192. 404. 405. - Presid. to it for life, remainder to B if he survives &
 30. 30. 232.
 3. 30. 438. it is contingent - & yet the probability of enjoyment
 La. 10. 523-4.
 3. 102. 488-9. is as great here as in the other case -

To determine whether a Remainder is vested
 or contingent - This is the universal criterion -
 viz - if it has a present capacity of taking effect
 in possession, if it were now to become vacant.

Leam. 149. to vest. But if the remainder has not this present
 capacity of taking effect in possession - it is always contingent
 ex. gr. To it for life, remainder to B if he returns from
 beyond sea in 5 years - now if it die, B can't take
 for he has not yet returned - after his return he can
 take at any time - So it vests - So if limited to the
 children of B. till the child is born this con-
 tingent, for if the particular estate should determine
 Leam. 149. First, the remainder would fail - secondly when born

If an estate is limited to two persons, Remainder
 in one event to one & in another event to the other, these

140. 143.
 4. 140. 332.
 140. 31. 89. 143. latter limitations are called cross remainders ex. gr. estate
 A & B or Joint in Common, Remainder to the survivor -
 But cross remainder cannot arise between more than two
 otherwise there would be complexity -

Remainders

This is not true & whether cross Remainders or not is a question of construction, & when it is raised by implication the presumption favors that construction if between two. But the presumption is agt it, if between more than two & the complexity is the reason of the last distinction. This is the end of the rule.

But where cross Remainders are expressly limited, they are good. However numerous the Remaindersmen - e.g. To A & B & after the death of both witht heir of their body, to C. Here is plainly an implication that as long as there are any Heirs of the body of either of them, they shall have an estate tail -

See. Lico. 25. -
4 Bac. 333.

Said again that cross Remainders cannot be created by Deed - This is not true.

The true rule is they can't be created by implication in a Deed, but may be in a Devise, because there must be technical words in a Deed & in a Devise intention governs. The rule is the same as to the creation of an estate tail which may be done by implication in a devise but not in a Deed; e.g. To A for life & after his death witht heir of his body to B -

1 East. 416.

Remainders

139

It seems to be the prevailing opinion that in Com. a
freehold estate may be created to commence in future
in a Deed as well as in a Will, provided it is to a
person in being at the immediate issue of a person in
being at the time of making the Deed - This is implied
in one of the Stat. of Com. which says, such estate shall not be given
unless to a person in being & I however think it questionable -

Of Executory Devise

This is a species of expectancy differing
much like a contingent remainder the differing in
the mode of its creation. Pl. defines an executory Devise
to be a Devise of a future interest not to take effect
on the Death of the Testator but on some future contingency

This includes a contingent remainder created
by devise as well as Executory Devise. So the definition
is imperfect for tho it gives the gen^l nature, it
does not as Logicians say give the specific

Learn 295
2 Bl. 172
137. can. ab. 135 difference.

a better definition of an executory devise or bequest is
that it is such a limitation of a future interest by
devise as the Law admits in devises but not in Com. Law
conveyances - It follows that any limitation that can
enure as a remainder can't be an executory devise
So a contingent remainder may be created by devise & is as

Remainders

Heane 298-9. 295. 302.

2 Wils. 222. 3 Wils. 457. 43. good, & yet is not an executory devise.

2 Ves. 111. 2. P. 388. 3 Atk. 348. Graft. 344. Comf. 236. Doug. 729. 1. mod. 158.

Executory devises are allowed out of mere indulgence to men's last wills & testaments, & here otherwise they would be void. The indulgence in almost all cases extends to the construction. But here it extends to the limitation. The reason is that wills are made by men with counsel in p^{re}sentia, in extremis. So it would be said to apply the com. law rule, & construction to devises. They were introduced by Stat. Hen. 8.

2 Aff. 172

Case D. 250

Heane 299.

2 Wood. 221.

Executory devises originated in the reign of Edw. 1. & have been regularly built up since that reign till they have become a common assurance.

3 T.R. 93-5.

Differ from a Remainder in three essential particulars 1st an executory devise, tho' a freehold to take effect in futuro needs no particular estate to support it, even in case of a freehold-less with a remainder. 2^d By way of executory devise a fee simple or other estate may be limited, on some contingency, on or after a fee simple. 3^d What is a remainder may be limited of a chattel interest after a life estate in it.

2 B.R. 145. 308.

Heane 303-4

Falk. 229. Cas. G. 870.

Calver 134. 10 mod. 320

Dy. 74. Mod. 170.

Lexo. Com 346

Such limitations as mentioned infra, in com. law conveyances are void, & are allowed only in last wills & testaments. If a freehold could not be given to commence in futuro.

Remainders

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and a Life exhausts all the interest a man had
in the subject. and again, a life estate is greater
than any chattel & so exhausts the whole term for years.

A contingent limitation may be so made by
deviser that tho in its creation a good remainder yet it
may in a certain event become an executory devise

Thus if a contingent limitation is made by devise to
depend on a preceding freehold capable of supporting it
as a Remainder & the preceding freehold fails before
the Testator's death as by the death of the first devisee
the second limitation shall then operate or enure as an
executory devise & yet it was a good contingent remainder
in its commencement - e.g. estate to A for life Remainder
to the widow. her. of B. & A dies before the Testator - now the
limitation fails & never takes effect, & so becomes void
before the death of the Testator, for the devise is not consum-
mated till Testator's death. Now the Ct. will so construe
this *ut res magis valeat quam pereat* & will allow
it to enure as an executory devise - for L. knew before
his death that the particular estate had determined
so L. must be supposed to intend it as an

Executory devise - reason is, if the first devisee survive
the Testator, the estate commences & after it has begun to operate
one way, you can't change the nature of it -

Remainders

To explain the rules on executory devises - An executory devise even of a freehold needs no particular estate to support it - It is a limitation by devise of lands or any other estate to A who lives to commence on the day of his marriage in good. This is a freehold to commence in future, with a particular estate to support it -

Again - a devise in fee to the heirs of A when he shall have one in good by way of executory devise.

Law, D. 255 &c.

Termes 303 -

2 Bl. 173. 2 Wood 233 he void in a deed, for tis a limitation of freehold to commence in future with a particular estate to support it -

Co. l. 78. 1 Sid 153

luc. 2 593. Lick 226-9

Calver. 132. 1 By. 20. 188

And in the mean time, till the contingency happens, the interest is present - i.e. the fee descends to the heir at law of the Testator ex. gr. To the unborn son of A when he attains 21 yrs. Now till that time the heir holds the estate with account, but his inheritance is defeasible -

2 Wood 235.

10. 11. 505.

Quay 46. 11.

Qd a fee or other estate may be limited on a contingency after a fee - ex. gr. To A & his heirs & if he die before 21 then to his heirs This is good by way of executory devise -

Remainders

Again to A & his heirs, - provided that if B has & goes to A by such a time, then to B & his heirs - this is good. In this case the second fee is not to take effect after the first estate expires; for a fee exhausts all the interest that can be had in any subject. here indeed the last limitation is not to take effect after the expiration of the first fee - this then a mere substitute for the first fee with a certain event. This is not a remainder for there a particular estate is carved out of an estate & that & the remainder constitute one estate - so this second interest can't be barred by fine or con- recovery.

10 mod 420
Joane 416.

ut infra -

Joane 309. 416
2 Bl. 174. 398.

2 Wood- 171. 622. & A if he does then & then, & if not then to B & his heirs
2 B 208. 149. ca. ab 360. 2 mod. 287. Talk 327. Talk. 132.

B is Remainder may be limited of a chattel interest after an estate for life - as gr. J. P. having a term for years devises it to A for life, Remainder to B for years. This is good in a devise - It could not be by deed, for in Con. Law conveyance, giving the life estate, which is higher than the term for years, amounts to a total disposition of the estate -

8 Geo. 35.
2 Bl. 174
2 Wood- 338-9.

Remainders

And this may be limited to any number of persons successively for life & yet give the ultimate interest over - & they all take in proper succession - of all intervening ones are dead - then the last takes next to the first

2 Pl. 174

There was formerly a distinction between a bequest of the use of a chattel for life & a limitation over, & a bequest of the thing itself & a limitation over. So in the former the limitation over, i.e. the remainder was good & in the last it was bad - There is now no difference - Both are good -

Peane. 204

8 Co. 95. 10 Co. 46

10 Pl. 1. 2 Pl. 385.

Geo. 6. 340.

Thus far of the distinction in the mode of creation of executory devise & contingent remainder - rather than to the diff^t nature of the estates when created

Exe. 306.

There is an essential difference in their natures also - viz. an executory devise can't be barred by fine or com^o recovery; & bars of contingent remainders - one reason is, executory devise is not a present interest - bars with conting^t remainder

2 Pl. 179.

Peane 306. n.

10 Co. 52.

Geo. 6. 570

Geo. 6. 185. 2 Pl. 388

2 Wood. 224.

But the principal reason is it is distinct from & don't depend on any prior limitation, on no particular estate. For it descends to the heir in the mean time - well what if he suffers a ^{recovery} or recovery? this don't affect the devise. For his estate is not a secondary part of the same

estate with that of the heir

As an executory devise can't be barred by a recovery, a time is fixed within which the contingency on which the limitation (ultimate) depends, must happen in order to render the limitation good. For otherwise men could create perpetuities. This is ag^t the policy of the Law — Hence with contingent remainders for they may be barred — is the contingency

Heane 3/4-15. 2 Bl 75-4 } may be ever so remote —

12 mod. 287. 2 Bl 234 }
2. Hurd 230-1.

a "perpetuity" is an estate unreasonable —

The rule as to the time of limitation in this executory devise to be good, must be so limited as to take effect if at all, within a life or lives in being + 21 yrs + 9 or 10 months afterwards — ex. gr.

2 Bl. 228.

2 Bl. 174

Long. 590.

Heane 3/4-2058.

7 S.P. 575. 100.

an estate in fee to the unborn son of A when he attains the age of 21. This is good — for it extends only to the life of the father + 21 yrs + a fraction — which is intended to provide for a posthumous child —

The above example is one of a life in being — it may be to happen during lives in being, & for here is no great danger of perpetuity. Thus to the unborn son of A & if he has none, then to the unborn son of B, & so on thro the alphabet. But you can't limit it after the life of a person not in being

Remainders

To you may vary the limitation - thus to A & L for life with condition that on a certain event, it go to the unborn son of B who at the age of 21 yrs. But a limitation to the unborn son of a person unborn in ^{life} - it exceeds this rule. However - If according to the terms of the limitation, the contingency may by possibility happen at a more remote period than that presented in the instrument, it is void in its creation: e.g. devise to the first unborn son of the unborn son of A in ^{life} - yet it may be within the 21 yrs after the death of A. But it may be otherwise. Bl. & others lay down this rule differently as to the remainder of a chattel interest, viz. that all the remainders must be in ^{life} during the life of the first devisee & that the contingency must happen during L's life - But this is not Law: for thus a remainder to A for life, remainder to B for life & then remainder to the unborn son of A would be bad, i.e. as to the unborn son, for the contingency here might not happen during the life of A, & of course the son might not take the ultimate interest.

Win. 361. For the old rule vide 1 Ld. 257. 2 Bl. 174

700. 102. Frame 320-1. 55-6 But now it is settled that the rules of limitation (i.e. the period allowed for the happening of the contingency) are the same in all the three kinds of executory devise, viz. that the limitation is good if framed so as to take effect within a life or lives in being & not when —

Frame 320. 3/4 u

320. 355-6

1 Wils. 207.

2 Bl. 174

Remainders

147

It follows as a genl rule that if an executory devise is limited to take effect after a genl failure of issue, or after one dies with issue or heirs (it being subjected to no other restriction, tho' too remote & so void - for it may take effect at a time exceeding that in the rule, i.e. the words import a failure of issue at any time indefinitely distant - ex. gr. To take effect after A dies with issue or to "heirs" & if he die with heirs to B - But how is this contingency too remote? I answer, as the case may be, this contingency may happen at a time after the life or lives in being & 21 yrs & a fraction - for these words import his heirs even surviving which may be 1000 years after his death -

The remoteness of the contingency depends on the construction of the words "if he die with heirs" because

Heane 315. 322.
341 & Over. 342. The words import a failure of issue at any future period -
Lell. 288. 289. So 'tis giving him an estate tail, by implication remains
877. 3 Lev. 111.
322. 377. 4 mod. 316. in fee after the lineal descendants become extinct. So
Le. R. 37. 2 Wood 232. he must die within the time prescribed -
3. 189. ca. 136.
But he may die with heirs 1000 years after his death -

Acad -

Heane 322. n
341 n. 170. 77. And this rule holds as to all the three species of
322. 156. - Executory devises - Moll. 61. -

Remainders -

You will remark remoteness in point of time is unimportant in converting a Remainder, for there is no danger of perpetuity because it is alienable -

But remoteness of time is the criterion in executing devise - otherwise there would be a perpetuity -

Observe this difference - Limitation to A & his Heirs & if he die with Heirs then to B & Heirs, this is not an estate tail by implication, but it is a fee after a fee & this is good - But if to A & Heirs & if he die with Heirs of his body to B, this is an estate tail

See also 350. 301. by implication, & B may take under the limitation
350. 125-6. 7 do 276. as a Remainder - This is had by way of executing
Case 234 Com. D. 426. devise -

However in case of such limitation over & of failure of Heirs of body - as if given to A & if he die with Heirs then to B, if here these words viz "if he die" are qualified & restrained by other words showing these words to be used in their vulgar sense meaning at his death - it is a good executing devise because his dying with issue is confined to a person life in being - But when it is not an estate tail by implication, it will construe it in almost any manner to take it out of this technical construction as to estate i.e. possible extinction - as if he say, "if he die with Heirs then to B" this takes it out of the rule -

Remainders -

49

3 C. W. 288

Leane 352 &
Salk 225

1 Wils. 207. good as an executory Devise So leaving no issue behind

Case D. 251

3 C. R. 146

Q. same as 7 C. R. 322. Volney. 229. 326. 240. 244. 308. 376. 1 W. 232

If devise to A in life, remainder to B in fee, provided that if A's wife has a son born, the land shall go to A's son in fee, the birth of a son, at once, defeats B's estate not A's not the particular estate -

Anderson vs
Walters -

Decided in Feb. 6th 1840 that the words to A & heirs & if he die without issue he are to be construed according to their ordinary acceptance & not according to the technical meaning & limitation in such an event, ergo may be good here as an executory devise. Lomb. - I think it best to adhere to the Eng. rules; for otherwise you overturn much of the Law. you can't give both constructions; it might in that case operate as a Remainder -

It is established that no executory devise shall take effect as such, if it can take effect by way of remainder -

any limitation of a future estate in any way of remainder tending to create a perpetuity is void whether in deed or devise I have said, & this construction which we have adopted would allow of perpetuity by means of executory devise - of course no remainder which would create a perpetuity is good -

Remainders

ex. gr. T. & for life, Remainder to L's unborn son, is good -
But to the unborn son of this unborn son Remainder to his unborn son is bad: for so the ultimate fee is always in abeyance

11. 11^{mo} 332.

Heane 291-2

5 Nov. O. C. 592

25 R 251-4.

3 Nov. 1632

So the rule is thus positively established, viz that no limitation can be carried farther than the unborn children of a person in esse

In some such case however Ct. of Justice, to effect the gen^l intent in devise will construe the limitation according to the doctrine of ~~the~~ ^{an near} as may be - i.e. will give an estate tail to the first unborn devisee, rather than the estate should fail -

2 J.R. 248-254

Where a contingent or other estate is devised over on a condition annexed to the preceding estate & the

preceding estate never takes effect, the subsequent estate or limitation takes its place, i.e. the remainder will be accelerated: ex. gr. Devise to A for years, Remainder to his eldest son, if he take the Testator's name & support remainder to B - now if he refuses to take it, B takes - This is substituting one for the other - Provided by the terms of the limitation itself - This differs from the case mentioned supra of the particular estate determining during the life of the Testator. So a devise to A in tail & afterwards since 15th of Oct die during Testat - B takes immediately on Testat's death

R. Ed. 316.

Dary 323-6. Bond 340.

Geo. B. 422. 2 Nov. 702.

Remainders

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But the ultimate limitation can't take effect if the preceding limitation fail - i.e. is void, then the remoteness of the contingency; for the ultimate one takes effect as a substitute for the other; but the preceding was on a contingency too remote, or perhaps the latter is too remote the preceding is bad in its execution - e.g. devise of personal prop^y to A & if he die without heirs of body, to B, remainder on contingency to C. A dies without heirs. Can C take? C cannot take on failure of B's remainder the limitation to B was void, for the prop^y is personal & to the substitute cannot precede the principal

See also 417. 18.

2 BR 245.

251.

2 H. Bl. 382

1 Ke 134

So if a subsequent limitation depends on a prior one & the prior one does not take effect, the subsequent one cannot - e.g. B & if for life Remainder to the unborn son of B. A refuses the grant, so there is no particular estate; here the remainder fails as better written on contingent

2 BR. 251 a"

Some General Rules as to Expectancies -

Nested Remainders are descendible, devisable, transmissible to heirs' representatives & assignable over before remainderman comes into possession. Personal prop^y is not descendible, but is transmissible only. In this case the interest is present & give a right to enjoy at a future time - as to this rule there is no contradiction for the interest is vested

2 Wood 287

212.

Remainders

And by modern authorities the same rule is settled as to contingent interests, as contingent Remainder & executory devise, except that they are not assignable in Law, but they are in Equity & this before the contingency happens, i.e. before the interest vests.

These latter are called possibilities clothed with an interest: the possibility descends - but in Law an interest is necessary in order to an assignment. They are assignable in Equity & not in Law. Because Equity construes an agreement executed i.e. a grant

Heane 286. 291.

439-40. Chas. 117.

47 R. 246. 14 R. 30.

3 R. 88. 93. 288. note

15 R. 222. 605.

1 Yonk. 202-3. Cow. D. 34.

224. 297. 1 R. 45. 7.

8 Vin 112. 2 R. 117. 470.

into an executory agreement when it can't take effect as a grant - This is to further the great intent of the parties. So when the contingency happens, they will compel the interest to be transferred in consequence of the former agreement.

This now is abundantly settled formerly a distinction was taken between executory devise of real property of person's estate - none now -

C Contingent Remainder or executory devise cannot be transferred while they remain contingent by deed at Law, for there is no present interest, & a grant must be of a present interest, except the interest in the contingency & this cannot be called an interest

406-132

Plow. 432

2 Wood 187. 212

Cow. 152

2 R. 290. 14 R. 374

Shep. 238-9. 312

Remainders

153

Indeed this is a maxim of Law, that no man can convey any thing at Law by deed, except an actual or potential interest, but here is neither. But this such interest as executory devise or contingent-Remainder cannot be conveyed by deed, yet they may both be passed away being of a freehold by fine or recovery, by way of estoppel. There is this difference however in the case of executory Devise it cannot be barred under the Statute, i.e. the contingent Devisee in himself a party to the fine or com^r recovery whereas a remainderman may be barred by a fine, barged or recovery suffered by the particular Part^r - a fine or com^r recovery is a bar to the party & all claiming under him -

2 Wood 212
238:
see Loc. 195
Heane 310-19.

The reason in the latter case is the fine destroys the particular estate & then the remainder falls to the ground. But in the former case the bar is only by way of estoppel -

An executory devise may be released at Law to the donor of the Land before the contingency happens - it release does not necessarily import a conveyance of any interest at all. It is only a waiver or abandonment of all right or title a man may or ought to have. He may bind himself never to make claim -

2 Wood 213
1 Per. 411
11 mod. 152

An assignment of an executory Devise will be second into effect in a Ct^h of Ch^l only. Equity construes it as an executory agreement or covenant to convey - Ch^l don't give an effect to the grant as such, but merely as containing another agreement. They will compel the

2 Wood 213
1 Per. 409
Heane 440-2
20. 17. 108.

20 Perm 250
9 mod. 181.

Party to make the conveyance when the contingency happens. But the assignor must be for a valuable consideration or for a "consideration in the second degree" as for the advancement of a child - Not enforced if purely voluntary

20 Perm 608.
1 Per. 409.

Events happening after the execution of a devise

1 before the consummation of it by the death of Testator
2 may vary the limitation from a remainder to an executory devise. 2d. That the event happens after the Testator's death if there is a double contingency 2d that a limitation which in one event - that has not happened would have been a remainder may in another which does happen be constituted an ex4 devise - The limitation in such case is called a limitation "upon a double contingency" or "upon a contingency with a double aspect" for here its operation as an executory devise in one event is provided for by the terms of the limitation -

Donor, 470-111.
2 Per. 249.

20 Perm 680.

2 Per. 249 Donor.
470.

If the first limitation is an ex4 devise, those which follow will necessarily be so - & be laid down in the books as a genl rule that when the first vests in someone - those that follow rest in interest & become vested. This requires qualification for this don't apply to remainders tho it does to ex4 devises -

In the prior remainder may be contingent & the subsequent vested. This last rule then cannot be extended to cases where the subsequent limitations depend on events which have not happened when the first vests in possession. Suppose then it is limited to A & then over to B when he arrives at 21 yrs of age. Here the first part of the proposition is true, because if a son is born, the former vests in A & the subsequent vests in B entire in interest.

Suppose to the eldest unborn son of A. on his birth it becomes vested. Suppose the limitation further to the eldest unborn son of B when he attains 21 yrs of age; now A's son is born before B's son is 21 & A's interest vests in possession. But B's cannot vest in interest. Hence does the rule apply unless where the event has happened before

Doug. 478
Fearn 336

the first vests in possession or during the continuance of the particular estate.

Thus far of Exec. Devises -

Estate in Reversion

An Estate in Reversion is the residue of an estate left in the grantor & to commence in possession after the determination of some particular estate granted by him e.g. a lease for years made by tenant in fee simple now all the interest except for those years remains in the grantor - So again, if he grant an estate for life - So if he give an estate tail there is still a reversionary estate, tho not much regarded -

2 Bl. 175.
Co. Litt. 22^b
2 Wood 172.

This reversion remains in the grantor by act of Law witht any reservation at all - for what he does not transfer remains with him of course.

2 Bl. 175.
3 Lev. 406-7
2 Wood 172

A Remainder is always created by contract compact or in some way by the act of the parties i.e. by some species of com- assurance - But a reversion is only created by operation of Law -

2 Wood 140.
Bolt 90
Co. Litt. 22^b
2 Bl. 175.

A vested reversion is transferable as well as a vested remainder - for tis an estate in presenti to take effect in futuro i.e. a fixed right of future enjoyment

Co Litt 22^b
Bolt 90.
2 Bl. 175.
2 Wood 173

181

Alienation of Real property by

Dece — on the introduction of the Feodal

system, there was a restraint on alienation. Indeed at first Land was not descendible. Stat Hen. 1. allowed of aliening a part of those lands which were granted by

2 M. 288-9.

Barons to tenants themselves; probably a moiety.

After the doctrine of descent the land passed to the heirs,

till heirs were all dead — afterwards they were allowed to

alien the whole, if acquired to themselves & assigns. Soon

after a man might alien the whole of the lands he

had purchased, whether the word "assigns" was used or

not — afterwards one fourth of lands descended, then one

half by Stat. 9 Hen 3 & then by Stat. 18 Edw 1st all restraints

were removed, except as to tenure in capite. That Stat. was

the Stat. of quia emptores. Then by 1 Edw 3rd tenure in capite

could alien by paying a fine. As to who may alien

or rather, who may not, vide title of "Contracts."

No person dissatisfied can alien, whatever title he may

have; I here suppose some person in power claiming

adversely. The object of the rule is to prevent a sale of

Land suits. The deed in this case is absolutely void —

& by pretended title in the Stat. is not in case of false

title, but the one here spoken of.

This act by Stat 32 Hen. 6 in maintenance & criminal —

2 M. 136.
2 M. 291.
Co. Loc. 214
209 notes.

Alienation by Deed

This Stat. is adopted in most of the U. S. & in all of them, the principles are adopted - We have such a Stat. in relation to joint or powers - He cannot convey - To be sure the mortgage's power don't prevent the mortgagee from selling, for the power is not adverse. Nor does the power of the particular tenant prevent the remainderman from aliening - nor the reversioner -

4th. 130.

There is one exception to the rule, viz^t the man under may sell or compromise with him in power - it is to prevent litigation - a contingent or possible interest that a man may, it is now settled

2 Bl. 290.
 Steph. Paul 158-9.
 32e. 11 mod. 152.
 1 Jac. 132.
 12. Jac. 374-5.

He may alienate as well by deed as by will - tho' Bl. says differently - the truth is, there is no such power as the nature of the case, & it is not adverse -

So upon the principles of the com. Law, felons & persons guilty of treason cannot convey after conviction - they might convey before conviction & it would hold unless they are convicted & tell them if they are condemned because of forfeiture by corruption of blood. But I think it don't apply here, for we have no corruption of blood - no forfeiture - In Eng. it is so they may purchase after the commission of the above crimes, but cannot hold - Fools & Lunatics in Eng. cannot avoid their conveyances during their lives, tho' made with the

1 Reeve H. C. L. 271.

60 Litt. 42.

Alienation by Deed

183

Co. Sec. 247
aid of the attorney Genl. His Hen may stridify him
I so avoid it. The King is guardian of Idiots & Lunatics
& their conveyances may be avoided in Lam. & Regis.
So the contract is void. They may however purchase just
as well as an Inf. for they have capacity to receive, no
assent is necessary - to be sure no obligation can be incurred

2 M. 291-2.
2 M. 283
5 Co. 119.
for it is void - So persons under dumex may purchase or
convey, but both acts are voidable. Aliens too may
purchase; an alien friend or enemy can purchase Land
but never can Lo them: for it is a Stat. The purchase
divests the grantor; indeed the alien holds, till found by
legal process to be an alien. I think it would be as
equitable if entirely void: after he is found to be an alien his
conveyance is void. But the Alien may recover his money back -

2 M. 293
Co. Sec. 2.
A Deed is a writing sealed & delivered: this applies
to bonds. you can never impeach it i.e. the parties never
can - one can't impeach his own deed i.e. say it had
no consideration.

Co. Sec. 35.
2 M. 296.
There must be parties sufft to receive & transfer
to an alien is sufft to take. There must too be a
consideration - this may be good or valuable; good, as

2 M. 296-7 Love & affection towards some blood relation; valuable as
J. Co. 83. money, marriage &c. like
Suppose a Deed had neither good or valuable consideration?

Alienation by Deed.

2 Bl. 296.
 Inst. sec. 532.

4 R. 4. C. 2. 162-3.

I think the question can never be made; because in a sealed instrument, consideration is always implied. Yet it is said in the books that it shall enure wholly to the use of the grantor - i.e. it will presume in favour of the grantor, construing it, as it appears, a mere use till grantee prove consideration. If a Deed purporting to be on good & valuable consideration, recites it, so that it appears on the face of it that it is no consideration at all, Judge Rieu thinks it would be wholly invalid & that no recovery could be had on it - undoubtedly personal property could be conveyed without consideration - as a horse &c. - But with respect to landed estates, the rule was established there; in revolution any time, to prevent confiscations, lands were conveyed away to the use of the grantor, & the use could not be forfeited. & in all cases of grants with consideration the law supposed it to be granted for his own use - a legal title was in the grantee, but not a beneficial use - By the Stat. of uses the legal title is vested in the cestui que use, so that the Stat. immediately reverts the title - the grant then is to himself & so is nothing at all. But here there is no such Stat. & no state of society requiring such a construction - there is consideration - & besides no consideration is necessary when the gift is executed.

2 Bl. 297 r. 538.

alienation by Deed -

105

Co. Lic. 249. The Deed must be written on paper or parchment
 2 N. H. 122. Orating is, I suppose sufficient so I suppose a stone Deed
 2 M. 297. or on white birch bark would be good - the C^t would
 call it paper if made in time of war &c -

Co. Lic. 245. This Deed must contain a precise description of
 2 M. 297. 8. the premises, so that they can be ascertained. This
 do. 297. instrument may contain a condition as a mortgage
 The proof of the happening of the contingency is by parol
 & lies in pari. The construction of the Deed is not to be
 controlled by parol proof.

2 Bl. 300-4 Warranties are either that the grantor has a right to
 sell the thing granted, or in other words that he is seised
 of the premises - which is called a covenant of seisin.
Covenants in Deed have taken the place of
warranties - Covenants are that a man is seised
 & also agrees to defend ag^t to defend ag^t any other claim
 whatever - A covenant of seisin means no more than
 that he has a legal seisin, & the seisin is sufficient in
 Law if he has no other claims - If he had no seisin
 you may bring the actⁿ immediately, whether you
 are evicted or not - If covenant of seisin dies, ag^t may bring
 the actⁿ - for it was broken in life time of Testator & damages
 only are claimed - A covenant of warranty lays a foundation
 for an actⁿ not till after seisin - this runs with the Land -
 so the owner may bring the actⁿ of any former owner & warrantor

Alienation by Deed -

This power to the heir also as well as the assignee -
 Suppose then the vendor had no heir - if one
 warrantor is sued, He ought to give notice to the
 preceding warrantor - If he don't come in & defend
 why he ~~ought~~ must as well as he can, & if he fails, & he
 then has his remedy. But if no notice is given
 the title is lost & the warrantor is sued, he may
 prove that he had a title & thus secure himself; & then
 the second warrantor who lost his title may have a
 new trial & by aid of the first warrantor ~~recover possession~~
 This notice is given in writing in order to be secure -

2 Bl. 304 - a Deed must be signed I think - no doubt of that

3 Lev. 1. 17. 492. now - for the stat. offences says it must be in writing

2 Bl. 305-6-7. So it must be dated - but it need not be dated truly
 for the delivery ascertain the date - so if the date is
 impossible as 29th February, you may show a diff^t date
 even by parol, for that don't contradict the date; so if
 there be a mistake in the date - the date then on the
 terms the owner proffandi on the other party - it is
prima facie a true date -

See also 46.

By 28. 2 Bl. 304. The Deed must be read if desired - this is not true

2 Co. 3. 9. 11 a. 27. if the other party can read it himself & it is known -

2 Bl. 305-6-7.

17th. 7. 2. 3. 10.

It must be sealed - this is so still - this was once very
 important - formerly sealing was evidence - now it
 none - It don't identify at all - It was indeed greatly import
 c. considerations in.

Alienation by Deed

167.

B. N. 254
Exp. 257.
160. 560.
Omn. D. 75.

This instrument must be delivered, & the date shows what was the time of the delivery if there was a delivery but it don't prove a delivery. The witnesses don't genlly know any thing of a delivery - the original intention was that it should be delivered so that it should

Ex. L. 35-6.
1 Dec 149. -

Dy. 192
Exp. 257.

be sworn to - Any act showing the intention is a delivery (the throwing a deed on a table & saying nothing if the other party takes it is no delivery - aliter, if the says "this will serve" - is a good delivery -) It turns the proof on the other party - If a deed is delivered to a third person to be delivered up on the happening

Ex. L. 36.
2 Feb. 307

2 R. H. L. 338
300. 448.

of a certain event it is an escrow; & if delivered up after the condition happened it is an absolute deed but if condition don't happen & it's delivered up utitur lies for it - But on this subject there is one interesting question. Can a man deliver a deed to a grantee to be void on a certain condition? (Can he not the condition here parcel, then how prove it?) If it is so the decisions are contradictory I suppose the distinction is this; he may deliver it to be void if some concurrent act is not then done. So if one deliver a deed of Land on condition of his delivering him a bond, here if the bond is not delivered, I think the deed is void - But here is another case; an award is made - one to pay money - the other to convey - the deed is delivered,

Alienation by Deed -

But now if the money is not paid, there is no delivery.

lrs. Co. B. 520-
835-112.

But where it is delivered to become void on the happening of some future contingency. Then the delivery is absolute, but the condition is void. These cases are said to be contradictory. But in the first case the condition was that he should permit him to enjoy his corn. L. did not own the corn then -

Mumf 577

If a person destitute of capacity to make a deed make & deliver it, & afterwards attains a capacity & delivers de novo, it is good. as gr. Jone covert delivers a deed again after coverture ceases: the first delivery was voidable, & it is a universal maxim that a void instrument cannot be affirmed - the delivery of it in this case de novo gives effect to it. It invalidates the deed from the first delivery - So it seems an exception to the maxim, or it must be that the delivery amount to an agreement. But if a feme covert should deliver it, as an escrow, & afterwards should again deliver it, the second delivery is void; for it does not give effect, since the second attaches on the first & that it is not good -

lrs. Co. B. 445.

Suppose now the person is capable of making a deed, but is disabled or impeded - Deives for instance out of power can't make a deed - Suppose such person delivers a deed as an escrow, & then gets power & delivers again

Alienation by Deed -

169

It is said it is good, & yet his incapacity is as great as that of a feme covert & the record attaches on the first; but it is by a fiction, viz the Law after she gets power^t supposes him to have been in power^t all the time - So he may have trespass for the same profits of disseisin - He has been in power^t by relation a sort of ius post limine

Mo. 35.
Co. Litt. 48.
Cro. E. 448

An exception in a Deed: Suppose a man in a deed excepts a house - a room, timber, emblements & these are good & don't pass; but they would have passed under the word Land, if no exception had been made - the Coke says an exception of a thing certain out of a thing particular & certain is not good - ex. gr. a lease of 20 acres of land, except one; but this don't mean that there may not be an exception or reserve of one acre; after describing the whole & then bounding the same it is good - but an exception of one acre ~~boundary~~ describing it, is bad from the total uncertainty what acre.

Co. Litt. 47.

Exceptions repugnant to the grant are bad, the grant being first & the exceptions last - I was never pleased with this rule it opposes the contract taken together ex. gr. a house & shop leaving the shop is bad - this is good - a house & shop, saving a particular shop - an exception that would destroy

2 Roll. 154

Alienation by Deed -

the whole contract is void; e.g. a grant of all land in Litchfield, leaving those by descent from a father; the grantor had no others in L. Hence so by the same mode of reasoning if it goes to destroy part of the contract not valid

4th. 1790.

Witnesses to a deed are not necessary in Eng. by the old com. Law, nor by Stat. nor are they now necessary - In ancient documents the drafts men used to insert the names of those present so as to prevent recurrence - After they could read & write, witnesses used to write their own names - so it is not then necessary by com. Law or by Stat. tho it is by usage. In Con. we require by Stat. two witnesses, & also an acknowledgment before a magistrate that it is his free act & deed, & it is to be notified - It is essential & if it is not done there is no deed any more than if there was no delivery - Indeed acknowledgment is strong evidence of a delivery - We also require that deeds be recorded, for before he can avail himself of a deed in Ct it must be recorded - As respects third persons recording is important for he who loses title gets his deed recorded first has the title - This is true in recording Counties in Eng. & I apprehend in all the U.S. tho other is guilty of fraud - Suppose the second one knew the other had bought

2 Inst. 78

3 Pl. 378.

Alienation by Deed -

177

And has not recorded, here he can't avail himself
of the other negligence - we decide & it is so in Eng.

2 M. 342. Because recording is not to give validity to the instrument
but to give notice to third persons to prevent fraud -

And if he has notice, no man shall avail himself of
his own wrong or fraud - Whereas if there be a defective
levy or attachment on a horse, & if another knowing of
the defect makes a good levy, it is good in Law. The
ground is this, the title is not completed as between the
parties & the Law allows a man to prefer himself to
his neighbours - I question whether scabing is necessary
here, tho' this in Eng. by Stat. of Transfers is in signing -

2 M. 308. Thus absent, make a deed void ab initio; a Deed may
become void by matter ex post facto; so by reason if it is
a material part & done by obligee - so if in an immaterial
part, otherwise there would be no security wth tampering -
Secus, if a stranger was in a part immaterial, it is still
good - yet it would render it void if done by obligee - If
obligor erases it, it don't hurt it, & you may prove the
contents by parol; ex. gr. He inserts 10 instead of a 100
acres; I know one case in which obligee altered it in one
word, viz. Beef into meat in favour of obligor & to make
it conform to contract; it was adjudged void: no relief

Alienation by Deed

11 Geo. 2^d.

2 M. 208.

2 Lev. 35.

to be had even in Equity - just justice required it -

Suppose the parties on agreement make an alteration - it is still good on the principles of the com Law -

But in Com. there was a case of an alteration & the witnesses had not attested the alteration & the Court made a compromise - It is not best to have intimations at

2 M. 304.

5 Geo. 2^d.

Roll. R. 40.

all, they may make a difficulty - If the seal is broken off the deed is void, may if the mice eat it off - Even if the mice eat it off in the custody of the Co^r -

a deed may fail thro' disagreement of the parties who are capable to disagree - hard is as good as written disagreement - ex. gr. in case of a Lunatic - So if obtained by

2 M. 304.

fraud & by will rescind it on terms of justice being done to the fraudulent party, for "Est Leg no passio" -

The modes of Conveyances ancient modes are now done away in most cases - One ancient mode was by Cooffment, i.e. by calling the parties together on the land & then saying that he conveyed the land, & delivered a twig & turf - The Cooffment & delivery was to refresh the memory - afterwards they used to write agreements - a gift was the mode of conveying an estate

2 M. 312. H.

Geo. Lin. 9.

2 M. 312 - 16. 17

Geo. Lin. 9. 142

as. 44-5.

2 M. 314 & 25.

tail - a grant was a conveyance of an incorporeal Hereditament - A conveyance of terms is a lease, so called now -

Alienation by Deed - Uses - 173

of Release. This was a transfer of interest to some person in possession of some lands & having a right. It was much ^{like} our quitclaim deed. The doctrine of uses is necessary to be understood in order to understand the nature of conveyances in our Country, as in England. At common law a man could not devise his real property. The Ecclesiastics (50 Edw. 3rd) devised the plan, that a man could convey land to his own use, & then the use was devisable - as they said in 1444 they would enforce this idea about a use especially as the uses were devised to religious houses -

246. 229 The Legislature prohibited this (15 Rich. 2nd) but it was then converted to another use in revolutionary times, as before mentioned, for men could still devise to other persons & then to religious houses - to be sure the trust could be forfeit, but not the cestui que ~~trust~~ - In 1444 they thought

246. 229. they could now enforce the trust, if the trustee conveyed it, or should die, & it should go to his heirs - The 6th soon extended it to heirs & all aliens except those with notice - & in the last case feoffee to uses was liable for breach of trust

246. 230

246. 331

The use was not liable to escheat, the owner or cestui could not be had in it, it could be devised - it was descend

4 Co. 12. 75.

2 R. 4. C. L. 1730.

-ible to heirs like other real property - it could be conveyed as land, & the land could not be devised yet this could it not being the land itself, no cestui could be had -

Alienation by Deed &c

2 H. 999.1.

It could not be extended for Deeds by an eligit either of
the trustee or cestuy que use; use could not be extended -
This was afterwards altered - I stated to you the doctrine
of uses, into com. Law before Heath. This is very impor-
-tant to be known as it relates to trust estates in Chy - viz. the

I had observed as to the nature of this estate, the cestuy que
use could not leave this estate, but People to uses
could. They first by Stat. enacted that the use be
extended - & that cestuy que use have power to make
leaves - afterwards that by them & via Stat. of uses would
the whole interest in the cestuy que use, so it became
immediately a secret mode of conveyancing - for by this
mode he could convey to his wife directly - before this
Stat. the conveyance must have been to T & A & then T & A
must have conveyed to the wife: but after this Stat. he
conveyed to T & A to the use of his wife, & then the Stat. vested
the possession in the wife. These conveyances were devised
from the estate. This Stat. put an end to uses, &
however they were afterwards revived in Chy under
the name of Trusts. For the Chy of Law held that where
the estate was given to the for the use of to for the use
of D. that the Stat. could not execute this trust - it did
not transfer the use into possession any further than to
we should have P that it first transferred it to to & then to D

1 H. 6. 248.
2 H. 236
24. 125.

Uses and Trusts

175

Chy then compelled to let B have the beneficial interest. So the Stat. was completely defeated. Again the Stat. speaks of persons seized to the use of B; so the Ct. held if there was a lease to one for use of B, that the other was not seized, but only possessed of the term. So they had to go to Chy in all such cases. This was a mode of eluding the Stat. There was no reasonable ground for Chy's jurisdiction, for where the estate was given to B to hold & furnish B with rents & profits, here it was necessary for B to hold it in order to carry it out. 1 Reg. Ca. 383 hints to exonerate the trust: In this case it was evident the trustee was intended to hold the legal title, & the other was not intended to have a deed. He can't compel the legal title to be conveyed by the trustee, whereas in all other cases the trustee could be compelled then to deliver or convey the legal title.

2 Pl. 326-7.

Qualities of this Trust Estate - It is liable to be charged in Equity just as real property is in Law; to be sure it is descendible, alienable, liable to be taken & sold; liable to forfeiture, devisable, & liable to be taken; but not to dower, this arose from adherence to some later precedent - In other respects it is liable

1 Reg. 325

1 Pl. 327

1 Pl. 328

1 Pl. 329

2 M. 337. 164. 251. In other respects it is liable just as heir estate
2 O. 110. 140. (and subject to all the rules that regulate the legal title.

conveyance that have grown out of this doctrine
or Stat. Bargain & sale, release & lease are in use
in most of the States. Bargain & sale is in its ap-
pearance like bargain & sale of personal property.

The former mode was to bargain & sell for the
use of C; then bargain & sale was made by it
directly to C; but here it occurred that living of
C was necessary to convey land. The C
said it was a contract to sell & of course he
became a trustee for C; so he holds for the use
of C & then the Stat vests the possession. This is all
done by the Stat. They were alarmed at these secret
conveyances. So Stat 27 Hen. 8 enacted that it should

2 Mod. 252. 2 M. 338-9. be enrolled in 6 months after excoⁿ. The officer
is custos Rotulorum. This officer chancellors executor,
title times become penetration - Then one was
2 R. H. C. 2 302. appointed particularly to keep the Records.

Lease & release are in the most great use in U. S.
In N.Y. bargain & sale is now used without entirely
the not in Corⁿ. In the first place a lease for
years is to be made to the vendee, then need not be made

If there is a trust secured to the grantee in the conveyance, it is
a bargain & sale. Trusts are common in the States.
These give conveyance to the vendee, when there is no trust, it is a
bargain & sale. 3 R. H. C. 2 302. 2 M. 338-9.
It should be made in part in some in title. M. 338-9.

See also 690.

For a lease of a year is not within the Stat. requiring
 enrolment. Then the vendor is trustee of the Stat.
 vests the possession - & so the vendor is ousted of the
 possession - Now you will advert to an old principle
 of release; for a man might always release his right
 to another, who was in possession. For any length of
 time. Then he releases his right & then a complete

4 Bl. 348-84

Co. Litt.
 270.

Co. Litt. 604.

title is given or conveyed. Fines & recoveries are
 not known in use Estates - vide Blackstone -

Alienation by Levy of an Execution; Now
 I don't mean where excon is levied to recover land.
 For title is there got before; judgment is conclusive
 evidence of title; as where actⁿ is had to recover possession.
 But I mean where on judgment of Debt, excon is levied
 on Land. at home. For there never could be such a thing
 during a man's life you could not encumber it by
 excon, you could not get any title to it. Our ancestors
 had no idea of leaving their tenure firm touched, after
 death it was indeed liable to Excon in favour of judgment
 creditors in the Lands of the heir. - ^{the most ancient mode - is one of specialty and} The judgment was against the
 heir indeed. This excon was levied not by appraising
 but by extending the Land i.e. 12 men are to estimate its

Plowd 141.
2 Mac 379.
3 Co. 12 Co. 17.
450.

annual value. & then the Or was to hold it at that rate till the debt was discharged. If however the heir sold the heir was clear - It was the Law; therefore that.

314 Mr & Mary made the heir liable personally to the extent of assets & land inherited, & the devisee of land by ancient Stat. could not be bound. But

2 Co. Litt. 394
2 Co. 11. 3 Mac 26.
1 Reg. Ca. 149. 11 Mac 777.

3 Mac 26. Leath. 245.

1 mod. 253.

the bona fide purchaser is not now affected. Even before that judgment bound the land, if alone after purchase of the writ or filing Bill of Middlesex. The ancient mode of getting at lands was by a Curia Regia, which allowed the Or to take the rents & profits of the land till debt was discharged.

2 Mac 328-4. 3 Co.
25. 3 Co. 12 Co. 26.
16 s. 1. 2 Co. 418.

2 Mac 11. 2 Mac 329.
Plowd 441

this seems to be a com. Law rule, or perhaps by some old statute that is now lost. (The king could always levy exec on land where there was defect of personal estate) but Or could not join the land immediately, but only take the crops, i.e. the profits. The Or could then defeat by leasing. So

3 Co. 11.
Plowd 441.

the Or after levy & execution the rents should be liable & hence must pay it to the Or

2 Co. 171.

Terms for years are personal property & so sold as personal chattels; they may however be extended if Or choose - so far com. Law

In Eng. is a Stat. that has altered the doctrine, for by a writ of Religis a moiety in quality & quantity may be extended: this is by Stat. of Westminster 2^d 13

2 M. 150. Edw 1. This rendered the lands liable during the life
 3 co. 418
 2 Bac. 329. of the owner - under Bankrupt Laws lands are all
 2 Adm. 475. liable to be sold for the benefit of Cr. These are
 the only modes of getting at Lands in Eng. In U.S.
 by State. Lands are to be sold as chattels in most
 of the States. In Conn. they are appraised off. The
 writ in other States is called vendition exponas
 This is natural in a new Country - The mode in
 the Eastern States is very difficult. We now sell Fee
 simple Lands, & even Stat. mentions no other -
 they are of so little consequence. The lands are
 appraised by 3 men; one appointed by the Cr
 one by the Dr & the 3^d by the Justice; & if Dr refuses
 to appoint any, then the Justice appoints two. This
 gives a title from the moment it is recorded. The
 Dr however can't force the land on the Cr - It may
 always take the body unless person property is turned out
 & if there is person property it will protect the body; land
 if he takes the body, it is a satisfaction for the whole -

Off. 182
2 Oct. 292.

The men chosen must be men of the country, but
what if the estate is in tail or for years or for life
as the Stat. says nothing of these? Why, we have a
Common Law of our own on this subject, we don't
notice the elegit in Eng. com Law - we lay on it
& extend it till the Debt is paid, & at the end of the
time it goes back. If I die he may have a
scire facias, for as the estate was for life or in
tail, it is gone at his death, so he may have a
scire facias for the residue. Equities of redemption
not liable in mortgagor's life time to execution -
an estate for years might be sold at the Court so
far as I know - we sell many things at the Court
improperly - To a Field of wheat there can be
no simple sale as in the case of liquor, Ome
or hay; & I think what ought to be taken by
a scire facias, i.e. by Executors. It should go as
goods & chattels. An Executors on a partition. Suppose
Judgment for partition between two joint tenants, in
Eng. the men with the Sheriff divide, & then the two accept
or reject the division as they like. In Com. we
take 3 men with the Sheriff in analogy to an appraisement
of land -

Joint Estates

181

Generally Estates are held severally, i.e. in an individual right, but when several hold together they are joint holders or owners. When several hold by purchase, or an estate descends to several, this is the case. There are three kinds, viz. Joint tenants; Coparceners, & tenants in common.

2 Bl. 177.

Joint tenants are a class who hold estates jointly. I shall notice the doctrine as it is at law. Law, in the U. S. Joint owners are not of course joint tenants. Joint tenants may hold an estate in fee - fee tail -

Lia. 277

2 Bl. 177-80.

for life - for years - at will - or sufferance. I shall notice this joint ten estate may be had in any conceivable property. This estate is always to be created by the parties, or one of the parties, by grant or devise, & never by act of law, or by descent. Not that a joint tenancy can be devised, but a man may by devise make several joint tenants of an estate. This estate depends on the words of the grant. The rule is this; if the estate is to more than one, it shall be joint, unless there be words importing it to be some other estate, as tenancy in common. There must be an unity of interest, i.e. one cannot have an estate for life & another in fee of the same property. If such an estate is made, the person has an estate for life, the other a fee in remainder.

2 Bl. 180

Joint Estates -

Co. Litt. 161. But it may be with¹ unity or equality of survivors but
 de. Litt. 190. 241. 185 Corporations can't be Joint tenants but take as tenants in com.

There must be unity of time & conveyance - If one conveys
 at one time, & the other at another time, they hold as tenants
 in com. for immediately after the first grant, the
 donor & donee are tenants in com. An act done by one of
 two joint tenants enures to the benefit of both - So if an
 act done to one; ex. gr. entry of one is that of both -
 de. Litt. 49. is in the power of one - so a re-entry by one - They
 cannot be sued or sue alone for any thing held in
 joint tenancy - they can't have Hosp. ag^t each other
 one can't lease with¹ the other. In short as com.
 have no acts would lie by one ag^t the other for any
 act that could be done. But by Stat. Westm. 2 cap. 22
 one may have the act of Waste ag^t the other. By Statute
 Ann. a modern Stat. one may have an act of assent
 ag^t the other. This has been adopted in com. & most
 of the States. It is very reasonable. Application is
 generally made to Equity to compel an acct. The jure
accrescendi is the most prominent feature in this
 doctrine - i. e. on the death of one the title passes to the
 other - It cannot be devised, nor does it descend nor
 can creditors get it - The reason that it cannot be devised
 is not that the title of the survivor is paramount to that of
 the devisee, but it is an act of the Stat. 4 Will. 2^d Sec 8. which says

3 bound. 1. 6842

2 Vol. 183. ~

Joint Tenants

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authorize the devise of this estate - This may be very important in some of the U.S. where there is no survivorship.

In law, it is doubtful about the *joint accrescendi* - I am inclined

2 Pl. 150 to the Law is that that allows a man to devise any estate
Coaster 182 143. that he possesses. If his estate may be destroyed at Com.

80. 290. Law by agreement of the parties to make partition
& actually making it; i.e. setting up metes & bounds. They
could not at law be compelled to make partition.

But by Stat. 43 & 44 Hen. 8. can compel partition, & it
is so understood in all the States whether they have
such a Stat. or not. For the Stat. was made before the

emigration of our ancestors they came hither with
the idea as their birth right. It may be destroyed

Co. Litt. 470 too by one of them aliening his share or by his conveying
Litt. 292-4 part of his interest by lease. For this destroys the unity

of interest as well as the unity of title. Even in this
case is joint tenancy of Reversion - Suppose A should
buy in the reversion it having been limited to A & B
for life; this destroys the joint tenancy, for there is

a merger, whereas if it had originally been given to
A & B for life, when added to it, it would be a joint tenancy
for there is no merger - But joint tenancy differs from the cop.
no joint accres. This by implication. In which no real estate unless already so

2 Pl. 179 to 187 intended - there must be express words - The Law, which is
directly the reverse to what is above in his subject -

Coproarcenary-

This is where there are joint owners by Descent, never by purchase. In Eng. this can't happen except in case of females. For if sons, the eldest takes the whole.

See 24.2. Or in case of Gavelkind Lands which descend to all the sons alike. In this Country males & females are coparceners. There must one & be used jointly. The entry of one, or possession of one is that of all, or causes to the benefit of all. So if one possesses over 20 years, yet he has no several title by reason of the Stat. of Limitations; for possession of one is that of both - yet you may gain a title ag^t the others that will prove effectual; not on the ground of one's holding adversely 20 years under the Stat. But if A & B are coparceners & B enters into possession, here length of time won't bar. But suppose A endeavours to enter, & B ouster him; here if A submits a great length of time it affords a presumption that the matter is settled. This time need not be 20 yrs. for it is not on the ground of the Stat. at all indeed there need be no ouster. If one has actually received the rents & profits for a long time peaceably, it is evidence that he holds ag^t him. In one case it continued 30 yrs. & was decided to give title. But it is presumed a much shorter time would answer. This presumption may be rebutted, because it is intended by the rule to quiet men in possession.

Cofarceuary

185

One Cofarceuary can never have transf. of the other, nor can
he have an act of Morte at all, either by com. Law or Stat.

2 Inst. 403. Joint Tenants. The reason given is, the cofarceuary should ever

compel a partition at any time, they may do it by agreement

3 Pl. N. C. 2. 266. but if one divides the other chooses - "cujus est divisio alterius
est electio". 266.

est electio". If this be the reason, then it follows that Joint

Tenants can have partition now, they can't have waste

They may compel partition by com. Law - There need be

no unity of time in Cofarceuary; so if one Cofarceuary dies

his children are cofarceuaries with the surviving brothers &

sisters - There is no jus accrescendi in Cofarceuary - it

is descendible to heirs - it is devisable by will, & alienable
by will. 103-4

Before Stat. of frauds it might be destroyed by

partition. This could be by hard agreement or by actual

performance - it must now be by mutual quit claim deeds

ex. gr. one of the South the other of the North part. They need no

other Deed but a quit claim. For each owns the whole. If
2 Pl. 174. b

one sells the purchaser acquires in com. with the others -
- 101.

Tenancy in Common

Any other joint estate than joint tenancy & coparcenary is tenancy in com. Suppose A should sell one undivided moiety of a lot to B. They are tenants in com. For there is no unity of time or title. nor is the title by descent. Again suppose I sell half a farm to B & lease the other half to C for life; there is no unity of interest, so they are tenants in com. So if one coparcener sells, it makes a tenancy in com. because the residue don't take by

2d Ed. 1909.

Lim. 283-93-5

309.

Descent; if course any method that will destroy either of the other joint estates make a tenancy in com.

Again. It may be created by grant, especially if the words are such as exclude the idea of joint tenancy as, to hold by tenancy in com. & not by joint tenancy.

It may also be created by words of description without words of exclusion - tho in this respect the cases don't seem settled - Suppose that one moiety belongs to A & another moiety to B. Now it is said that this is not joint tenancy; for joint ten't hold not by halves, each holds the whole; so if an estate was granted half to A & half to B. they are for the same reason tenants in com. If given to A & B jointly & severally it is said to be a joint tenancy - but I have seen both words are used - It is said however jointly is used first I answer you don't give the

See 274

Tenancy in Common. 184

construction to jointly & severally in a Bond or in any other instrument. Besides this construction is opposed to principle or to the intention. I suppose if this case were now bro't up in Eng. it would be decided to be a Tenancy in com. If the estate is given to be equally divided this is a will is a Tenancy in Com. even in a bond. The distinction is idle for the intention is the object & guide in both cases.

Cogh. 152.

189. (a. b. 29).

1 P. Wms 17.

3 Co. 29. 214. 1834.

11 Hen. 32. —

I presume no difference would now be allowed in Eng. —

Tenants in Com. are compellable to make partition. By

Stat. Westm 2. They are liable for waste & by Stat. 4 Ann they

are liable to an action of acct. There is no joint accerscend.

Joint owners can bring Ejectment ag^t each other, but its

effect is not to turn one out, but to put another in — so it

is diff^t from other acts of ejectment. He is to prove that he

is turned out. It will indeed rebut all possible presumption

that could arise from length of time. Tresp. will lie in one

case, viz in case of a total destruction of the thing, as if one

destroy a house or a mill. Leases may be made by

tenants in Com. severally. It is said they can't make them

jointly. I don't know the reason of this — yet if you sue them

severally the writ will abate. In all cases joint tenants

coparceners are to make leases jointly. But tenants in Com.

may lease severally. One joint tenant of goods sold to other

may join in the return. Stat. 127. Ed. 1. 228.

Ed. 311.

Co. Litt. 187.

Tenancy in Common

In Connecticut Joint owners are not obliged to sue or be sued jointly one may sue, or any number or all - And if one gets possession he holds for all - This (adjudication) arose from a singular circumstance in which case the Joint owners were very numerous & they died or married just before the trial, & thus abated the writ - so the writ was brought agt one & certiorari -

Now Joinder in Eng. in such case must be taken advantage of by abatement. Joint merchants ~~at~~ Joint Ventr, & yet as to Debt & goods there is no jus accrescendi by force of Law Merchant. There is another exception where farmers hold utensils & implements of husbandry & stock jointly, then is no survivorship -

2 Bk. 191-4.

Descents

183

A knowledge of the Eng. Stat of distribution of personal property will teach the doctrine of Descents in the U. States.

The reason of this, is, our Stat. of descents in U. S. of real property, is the same as the distribution of personal property under Stat. 42^d Sec. 2^d - The terms made use of are the same. They all take this Stat. as their foundation - one thing is clear, it will teach us to distribute personal property - vide Judge, Remond, & Co.

The Law under Stat. Sec. 2 has been altered by Stat.

1 Ver. 334
2 do. 24. 325.

1 Bell. 252.

2 do. 115.

do. Sec. 23.

7. Chy. 54. 97.

4 Penn. R. 2303.

10. Wm. 31. 25.

1 M. 54. 5. 405. 415.

Concl. 114. 78.

Sec. 1st by which Stat. it is enacted that the mother should inherit equally with the brothers & sisters & their representatives. The person who takes under the Stat. must be related by consanguinity, not by affinity, & such one as is born in, lawful and stock -

1st The mode of computation of kindred is by the civil Law, & the lawforetters made in the mode of the civil Law.

Vol. 517. Lovel. 229.

4 Penn. R. 2303.

2 R. 500.

The manner of distributing in the descending line is sometimes per stripes & sometimes per capita as stated -

3 The Half Blood is as near of kin as the whole Blood - Thus

1 M. 505.

2 Kent. 417 -

1 Mod. 209. 12. 205.

baill. 61. 2 Ver. 126. 126.

10. Wm. 31. 25.

1 Chy. 54. 97.

were several decisions 5 years after the Stat. that the Half Blood should have but Half a Share - but they are overruled & it is now settled that they shall have an equal share.

2 M. 114. 78.

11. 116. 35.

4 Penn. R. 165.

9. 11. 20.

2 do. 50.

2. Chy. 20.

4th A posthumous child is equally entitled with other children, for distribution is not made under a year by Stat.

5 This distributory share vests in the Infant immediately, so as to be transmissible. Thus but one child, it takes the whole

Descents

of this there once more - doubt, because Stat. does not speak
of child, but children -

6th In the ascending & collateral line, all who are of the
nearest of kin whether on the part of the father or mother
will share equally in the intestate's estate -

7th The distribution among collaterals in the ascending
& collateral line is (as stated in the Essay) where all the
claimants are in the same degree of kindred they take
per capita - Where there is a difference, i.e. where
some are allowed to claim who are in a more remote
degree than others, they take per stirpes as had their
ancestors would have taken - & this right of representation

by the Stat. extends no farther than brother's & sister's children
viz. the fourth degree: of course children of uncles &
aunts are within the Stat. Regard is only had to
proximity, except these brothers & sisters are preferred
to grand parents -

8th Under the Stat. sec. 2 if the father is dead, the mother
living, she would take the whole.

9th The mother takes as a brother or sister under Stat.
Sec. 1st an equal share so as to draw up the children
of a deceased brother & sister to take by representation -
The representation must be by consanguinity -

10th The intestate dies without relations his property
rests in the King. Occupants take (as there is no real person
in this country) unless Gov. take out administration - In Gen.
(as in Eng. the King would take) it goes to the State Treasury -

10th 445.
2nd 212.

11th 25. 544-5.
2nd 108-9. 999.
11th 41. 2-3.
3rd 460
1st 250.

4th 349.
2nd 74.

18th 482.
2nd 344
2nd 85

Descents.

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The beforementioned rule of distribution of intestate estates do not apply to the estate of a deceased wife who dies in the life time of her husband by the Stat. 22 Geo. 2 & 3 Geo. 3. The ordinary must grant administration of the personal estate of the wife to the husband, or in case of his death before administration to his Ex^r or administrator. This has ever been the construction of these Stat^s. Such estate the wife may have at Com. Law, for if she died & husband had not reduced her choses to possession they did not go to the husband but of right belonged to the wife's next of kin & by Stat 22 Geo. 2 The husband equally with all other administrators was obliged to distribute such estate after the payment of Debts to the next of kin to the wife & their legal representatives - But Stat. 24 Geo. 2 altered the Law in this respect & thereby it was enacted that Stat 22 Geo. 2 should not extend to the estates of James comest but that their husbands might demand & have administration of their right, credits & other personal estate & recover & enjoy the same. By this Stat. the liability of the husband to pay the Debts of the wife is not altered, for he is not entitled to more than the surplus after Debts are paid - as the next of kin is in all other cases. If husband die before administration granted him, his Ex^r administers on his wife's estate; not his wife's next of kin. So if he is removed for misconduct, he has the surplus after another has administered

Stat. 526.

Stat. 526.

W. H. 381/76.

as to 38.

Vol. 455.

W. H. 188.

38. Nov 31.

Descents - 1

the sh. may die indebted to a great amount - for as soon as sh. is dead, the Husband is not liable for any debts contracted by her before coverture. However -

great the fortune may be which he received with her. When I say he is not liable, I mean in the capacity of a Husband - He is liable as administrator, to the amount of assets left by her at her decease -

I apprehend that in all the States ~~where~~ there exists a Stat. similar to 9 & 10 Geo. 2. But not any such as 29 Geo 2. That Husband as administrator to his wife in Geo. must distribute the estate in the same manner as all other intestate estates are distributed. By the Stat. of distributions it is provided that no child of the intestate (except the heir at law) on whom such intestate has settled in his life time any estate in lands or pecuniary portion equal to the distribution of the other children shall have any part, in the surplus after debts paid, with the brothers & sisters - But if the estate so given them was not equal to the distributive share of the other children, that they shall have as much as to make them equal - We have a similar Stat. only no exception of heir at law.

Advancement, is whatever is given as a marriage portion with a child whether in real or personal estate - All provisions made by a marriage settlement for

2 Bl. 504
Law. Rep. 196.
10. Geo. 281.
3alk. 826.

Descents

13

for certain children, are advancements - to all deeds of Land or sums of money given to a child to set him up in business are advancements whether given as marriage portions or not - If such deeds purport to be given for value received & were not, they are advancements -
vide "Parent & Child"

98. M. 917.
 2 do. 658.
 30. Cal. 249.
 21. M. 141.

Stat. Con. distributes real & personal prop^y both in the distribution second prop^y of every description & real prop^y of every description in the ascending line is regulated by Stat. It varies in no respect - as it respects the ascending & collateral line the "person" prop^y together with a certain description of the real is distributed one way & another description of real in another -
 I observe that the half blood (i. e. Eng) inherits equally with the whole blood in ancestral estate, provided they were of the blood of the first purchaser - What means "of the blood?"
 This formerly meant lineally descended from. It cannot mean so now under con. Stat. for if so it defeat the Stat. It means "blood relation" related by blood, "if the kin" - the old Stat. was "propter sanguinem" - I have seen no Stat. of distributions of any of the States except Virginia that do not adopt the civil mode of computation by kindred. The Eng. Law of descents is 1. In the ascending line the eldest son exclude other sons & daughters. This rule was not adopted till 1842 before all sons took equally - Gal. S. L. 255.
 Propter sanguinem exclude propter sanguinem, propter sanguinem exclude, remainder sometimes distribution
 If there be no sons, daughters inherit together.

R. H. B. L. 41.

no. 310.

Descents

2 Bl. 27. 5. 9

2 If the eldest son is ever leaving issue, that issue returns
all others - & it is not material that such is a female, for
the Law always prefers the right line to the transverse - &
the descent among females is always per stirpes -

2 Bl. 234

2 Bl. 4

The estate never ascends - It must descend to the next
kinsman of the whole blood, if such kinsman be of the blood of
the first acquirer of the estate, i.e. if the estate descended to D. S.
from Robt. & then the issue Robt can inherit; If it came from
D. S. then it vests in uncle. b. But when it descends from
the father's side it must go to the mother's side & vice versa
But if a man first acquires an estate himself, it then lets
in no collateral, but the fiction in such cases supposes
it to descend first from the father's side & then from the
mother's - 1st The Law presumes it came from Reuben
then it came from Solomon - This lets in the uncles
There are none - then it came from Nathan, this lets
in the great uncles of Abel's blood, no Abels in to be found
then search the maternal line of the maternal line of
the father - no relations on the father's side can be
found whether Abels or Rebs - then it descended from
Mazg, but she has no issue, it descended then from
Mazg's father Sam. Hale & this on in the mother's paternal
line, then in her maternal -

2 Bl. 237.



Estate upon Condition

2 Pl. 152.
3 Pl. 281. An Estate upon Condition is one which depends upon some uncertain event, by which it may be created, enlarged, or defeated

2 Pl. 152. It is of two kinds; - 1st Estate upon condition implied; 2nd Upon Condition expressed - under which last division one estate holds in pledge

1. Estates upon Condition implied, are those to which some condition is annexed from the nature & essence of the estate itself - the most extensive - e.g. Grant of an office - condition implied is that grantee shall duly execute it - forfeited if not duly executed

2 Pl. 153
3 Pl. 281. If it is a condition tacitly annexed to every estate that the owner shall do no act incompatible with the estate which he holds - e.g. Grant for life or years except a stranger in fee - his estate is forfeited

2 Pl. 154.
3 Pl. 281. II. An Estate upon Condition expressed is one to which is annexed an express qualification for which the estate is to commence be enlarged or defeated -

Conditions of this kind are either precedent or subsequent.

Estates upon Condition

Precedent Conditions are such as must happen or be performed before the estate can vest or be enlarged — Subsequent are those by which an estate vested may be defeated — e.g. an estate granted to A to vest on his marriage is precedent; an estate granted to A for a certain rent with a condition that if not paid grantor may enter & avoid the estate is a condition subsequent.

2 Bl. 154.
Litt. § 325.
Co. Litt. 247.

2 Bl. 154. 107. To this Lead are referable base fees & fees conditional at Com. Law.

7 Pl. 117. Co. Litt. 201. In the last case if the rent is not paid, the grantor cannot recover the estate at Com. Law, unless he demands.
7 Co. 28.
Litt. § 328.
5 Co. 40. — the rent on the day

2 Bl. 155. Distinction between an express condition in a deed & a limitation which is called a condition in Law; "so long as" "while" "until" are words of limitation — "upon condition" "so that" "provided" are words of condition in a deed —

10 Co. 41. —
Litt. § 380.
3 Pl. 41.

Estates upon Condition —

3.
211

2 M. 155.
2 B. 141. If the qualification annexed is a limitation on the contingency happening the estate ceases immediately & of course without any act done by him who is next in expectancy.

2 B. 155.
L. 2. 347. But if an estate is strictly on condition in deed the Law permits it to endure beyond the contingency unless the grantor, his heir or assigns take advantage of the breach of the condition by entry or claim.

2 M. 155.
1 Vent. 202.
B. 2. 285.
1 B. 411. If however strict words of condition are used, yet if on breach of the condition the estate is limited over to a third person, the qualification is called a limitation. For if a condition, the estate could be avoided only by the grantor or his representatives, so that the remainder might be defeated by their neglect. e.g. Grant to A on condition that in one year he marries; Remainder on failure to B. — To devise to the heir at Law, on condition remainder over.

Donch. 466.
2 B. 150.
1 B. 257. If a lease contain a clause that the tenant may waiver for non payment of rent; actual entry is not necessary to entitle tenant to ejectment.

8 B. 27.
2 B. 176. as express condition that lease of a term shall not assign, is good; formerly doubted — 2 B. 128 re 800.000. 2 B. 279.

Estates upon Conditions

2 G.R. 140.
425. If a lease is made to A his Ex^{ty} is with condition that his Ex^{ty} shall ~~not~~ assign, is it good? Since Ex^{ty} takes only for the purpose of satisfying claims ag^t the estate -

5 G.R. 641. If one holding an estate for life or years on condition that he shall not assign - attempts to assign by deed which proves to be absolutely void for want of requisite the estate is not forfeited -

2 G.R. 133. A proviso on condition that if the lessee becomes a bankrupt, lessor may enter is in good ag^t the assignees -
6 G.R. 689.
8 G.R. 51.
2 G.R. 219. -

Is of a proviso that it shall not be taken in execution ag^t lessee - I deem - (at supra)

If an express condition subsequent annexed to an estate be impossible at its creation, the estate is absolute in the tenant. e.g. Grant to be void, unless grantee marries a dead person - So if it becomes impossible by the act of God, or of the feoffor, the estate becomes absolute - as condition that grantee marry within a year, a person who afterwards dies within the year, or whom feoffor himself marries - So if the condition be ag^t Law or repugnant to the nature of the estate the condition is void & the estate absolute

2 M. 154
Co. Litt. 201. b. 17
Ans. Co. 261. 2.
As condition that the grantee take his estate or that
the grantee in fee simple shall not alien.
Condition in these cases are void.

But if a condition precedent is unlawful
or impossible; the condition being void, the estate is
also void - for it depends on the condition & therefore
2 M. 154
Co. Litt. 205. no title can vest till it is performed; But an impos-
sible act cannot be performed; & the performance of
an unlawful act can confer no right

Co. Litt. 54. C.
Barnard 90.
The performance of a condition is matter in fact
provable by parol evidence -

2 M. 154
Under the head of estates defeasible upon condition sub-
sequent fall estates holden in fee - These are of two kinds -

2 M. 154.
Co. Litt. 205.
1st reversion reversion living fee - i.e. an estate granted to a
creditor to hold till the rents & profits shall satisfy the debt.

Co. M. 3. 4.
In these cases the grant becomes void & the estate determines
as soon as the debt is thus satisfied. Hence called living fee.

2 M. 154.
Co. Litt. 205.
2^d reversion reversion living fee - i.e. an estate granted to a
creditor to hold till the rents & profits shall satisfy the debt.
or reverts to the grantor i.e. the reversion.

Estates upon Condition

II. Mortgage — *Mortuum pignus* or *dead pledge*

This is an estate granted by a debtor to his creditor with condition that if the grantor, i.e. the mortgagor, pay the debt on a certain day, he may reconvey; or that the grantor shall reconvey; or that the grant shall become void

2 Bl. 157-8.
Pow. M. 4.
Litt. S. 332.
Co. Litt. 205.

Reconveyance is not necessary to revert the mortgage right; but it is more safe. Secur his right would cover on parole evidence —

2 Bl. 157-8.

Pow. M. 4-13.

18 R. 755 argu.

bro Ca. 447-9-59.

It is called a dead pledge, because if the mortgagor fails to pay at the day, the estate as to him is forever gone at Law with a possibility of reconveyance —

a mortgage then is an estate pledged by a Debtor to a Creditor as security for the Debt —

Mortgage in its original sense denotes the estate pledged now sometimes used as synonymous with mortgage itself —

The Grantor is called the mortgagor; the grantee the mortgagee.

The Condition is called a reconveyance because its office is to depart the estate; & may be either incorporated with, or annexed

3. 5.

the grant — or make a distinct instrument —

Mortgages

For two instruments executed at the same time & relating to the same subject matter pos. but one contract.

As soon as the estate is created the mortgagee may take possession; the latter to be discharged upon performance of the condition by payment at the day; for the legal title vests in him immediately, the defeasible not taken - (plus best)

But the usual practice is for the mortgagor to remain in possession till the day of payment -

There is at Com Law a distinction between a grant made to secure a gift or gratuity, & one made to secure an antecedent debt; in the latter case, a lien of the money at the day discharge, the mortgagee lien only, & reverts the mortgagor's title - In the former it discharges not only the lien, but also the personal duty, i.e. the whole obligation - for as tenor discharges the estate, the mortgagee can have no claim except on the ground of a debt or personal duty, but there is none -

The condition of a mortgage deed was formerly considered as a condition prescript, because its effect is to

now s. 454.
Co. Litt. 247 & 249, 250
Litt. d. 355-8.
9 Co. 77
Co. Litt. 245.

Mortgages

Prov. T. Co. Litt. 205^a re-estate the mortgagor in his inheritance -
 205^a = 213^a 221^b -
 1 Co. 22. Bro. Co. 427 not so now -

Formerly if the Condition of a mortgage in fee was forfeited, the estate being absolute at law, the wife of the mortgagor was entitled to dower in the estate & it was subject to all his real charges -
 Prov. T. 214. 158. wife of the mortgagor was entitled to dower in the
 Co. Litt. 221-2. estate & it was subject to all his real charges -
 Bro. Jac. 191. To remedy this inconvenience it became usual
 3 Bro. 632. to grant a long term by way of mortgage - This
 1607. (see ab. 317) practice is generally pursued now in Eng.

In Con it is usual to mortgage in fee, & the wife of the mortgagor has no dower - except on a foreclosure

If a bond be given by the mortgagor conditioned
 Prov. 10. 12. for the performance of the Covenants, agreements &c.
 2 Liv. 116. in the mortgage deed - non payment at the day
 3 Kib. 387. is a breach of the Conditions - It is not left
 Bro. Jac. 281. at his election. -
 Yelv. 206^a

Mortgages

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How Mortgages are considered in Equity

Case 13. at Com. Law if the Condition was not strictly performed the Land vests absolutely in the mortgagee (as before) - So that an estate of great value might be lost for a trifling consideration.

The inconvenience of this Lawship on mortgagors was a contest between the Ct of Law & Equity - The former construed the Condition strictly, the latter

Case 14. 1697/8 considered the transaction as a mere personal contract for the payment of the loan or debt, & the mortgage as a security for the performance of this personal contract - the mortgagor was considered as the actual owner of the Land - Failure of payment non obstante -

Case 14. 15 Nov. 575 The Ct of Chancery finally prevailed. Since which the jurisdiction of mortgages has been exercised almost exclusively in Equity - Where the debt is esteemed the principal & the land pledged merely as the incident - So that whenever the Debt is paid, the interest of the mortgagee determines & he becomes as to his legal estate a trustee for the mortgagor

Mortgages

His equitable right after forfeiture is called "the
 Power of Redemption" & is known only to the Law of
 Equity -

But still until redemption or satisfaction
the mortgagee's interest continues even in equity —
so far as to entitle him to the profits — Hence a
mortgage is not such an alienation as allows any
previous disposition, except so far as such disposition

Down. 15. 187. is necessarily affected by it - ex. gr. A makes a
1 Keir. 182. 342.
329. 22^d N. 968. voluntary conveyance by way of family settle-
2 B. Wm 649. ment & afterwards mortgages the estate, then
How. P. C. 155 mortgage is forfeited - still the issue is entitled
1 Roll. 616. to the estate in equity on paying the debt -

Ans. 2. 64-18. 509. To a devise to A & Linds afterwards mortgaged
30th. 1798. Crull. is revoked in equity pro tanto only, the totally abated.
15. 14. 12th. 806.

But a mortgage to devise of Land before
1 Rev. 17. 18
Ore. Bl. 514. devise is a total revocation, the two interests being
Geo. Loe 49. inconsistent for under the devise, he would
3 Ver. 9417. 600. hold as mortgagee - under the deed as mortgagee
Geo. 656.

Mortgages-

Every contract for the loan of money (or for payment of a debt) secured by the conveyance of real estate & not intended as a disposition of the real estate is in Equity deemed a mortgage.

And all private agreements made at the time to prevent the redemption the money is paid on the day are void. original nature cannot be thus altered. If enforced, the mortgagee might take advantage of the mortgagor's necessity. Once a mortgage always a mortgage" ex. gr. an agreement that if the mortgagor does not redeem within a given time, he shall not claim his Equity, or the conveyance shall be deemed a sale -

And it makes no difference as to this point whether the proviso for redemption is in the same deed or in a distinct instrument.

nor will an agreement at the time to make the conveyance absolute on failure of payment of mortgagee will advance an additional sum after the case.

But an agreement that in case of a sale of the equity the mortgagee should have the right of preemption would be good it seems -

Mortgages.

1st Is a subsequent agreement for an absolute sale executed by the parties, is good — Is a subsequent release of the Equity, with an agreement by the mortgagee to reconvey on certain condition —

Row 28. 119.

1 Vern 268.

Talk. 61. 15 Ves

468. 269. ca. ab.

395. 5. 1 Bro. C. 6. 149.

Conditions.

Here the mortgagee is not bound to reconvey, unless the mortgagor strictly performs the Conditions.

2nd In some cases of family settlements, & where the transaction is between members of the same family & where the benefit or kindness is intended in a certain event to the mortgagee, an exception is admitted to the maxim "once a mortgage is" e.g. a father, a mortgage his son, upon valuable consideration by way of family provision "redeemable during his life only" not redeemable after his death — Is a mortgage to his brother to secure a loan with an agreement that if it has no issue the mortgagee shall have the Land, the agreement is binding — Here is no danger of imposition on the mortgagor — It is a kindness intended to the mortgagee

One 21. 33.

2 Vent. 364

1 Vern. 7. 214. 232

193. 269. ca. ab.

29. 8.

Mortgages

225
221

2nd. 4th. 7. An Absolute deed is considered as a mortgage when
Cov. 68.
3rd. 50. the agreement to convey is inferable from circumstantial
Re. ch. 526.
3rd. 429. facts.

Parol evidence is admissible to prove payment
of the debt due to the mortgagee. of course the
mortgagee's interest in the land may be defeated by
parol evidence - for when the debt is discharged
his interest ceases. Stat. Exoner. now obsolete. In a case
of a bond (And if he La. forgive the debt, parol
evidence of his declaration & acts is admitted to
prove the fact - ex. gr. "Take back your writings, I
freely forgive you &c."

But a parol agreement between co-mortgagors that
the whole charge should eventually rest on the Land of
one of them is within the Stat. of Frauds. sensu.

If Land is devised to trustees to raise money out of
rents & profits for the payment of debts or portions
& no clause empowering them to mortgage, still if
money sufficient cannot thus be raised, trustees
may mortgage or even sell; secur. if suff. can
be raised, or if debt be due to be p^d out of the rents &c
only

Mortgages

How 66. 77. 80. The Interest of the mortgagor in the premises mortgaged.
2 W. 158.

as soon as the estate is created, the mortgagee may enter
the legal title is in him, tho' defeasible -

Hence if there is an agreement that the mortgagor
shall remain in possession for such a time; then

How 66. 7. He is tenant for years - But an agreement that
How Dec. 659. 60 He shall continue in possession for no fixed period
leaves him tenant at will -

The mortgagor left in possession is (so far as

How 66. 75. respects the right of possession) & even before the day
84. How Dec. of payment quasi a tenant at will - tho' in some
659. How 212. 270. 3 Bank 449. respects he differs from such a tenant.

How 68. - How Dec. 660. Hence he may be sued in ejectment, without
How Dec. 303. 5. - notice to quit - Com. L. 1. at will must have notice to depart.

But mortgagor in possession is not liable for rent, as other
How 22. tenant at will are, for he pays interest. He is not en-
How 76. 67. 8. titled to emblemments, for all is liable for the rent &
they apply in discharge of it -

Again - a Com^r Tenant at will cannot lease, or
(under let, such an act ipso facto determines the
estate - But mortgagor in possession may make
a lease which will be valid unless the mortgagee

Mortgages

15
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1 Rest. 47. elects to depart it - Mortgagee may treat the
 Long. 22. lease as a surrender or not; Trespason or
 Cov. 68-9. disceisor; for lease stands in the same situation
 Bro. Jac. 646. with his lessor -
 Bro. Jan. 313-5.
 Pow. 80.

Pow. 74-5. The lease is also voidable in ejectment without
 Long. 22.3. notice, & is not entitled to emblements - sembl.
 the lessor is wrong above - vide. 3 East 449.

Pow. 68. Mortgagee may treat such lease as his tenant's;
 1 Att. 665. & by giving notice may make lease pay him all
 Long. 265. the rent in arrears - i.e. all due before as well
 Pow. 84. as after the notice; but not to pay what he has once
 paid to the mortgagor.

1 d. 3760. Mortgagor a lessee sued in ejectment by mortgagee
 Pow. 470. cannot allege a title in a third person to defeat mortgagee
 1 Ken. 253. Estoppel -

Pow. 75. Lessee's title is good as mortgagor & all strangers;
 1 Bl. ca. 59. for the mortgagor is estopped to deny his instrument;
 Bro. Jan. 314. & as against strangers a peaceful possessor is sufficient, & he
 may sue a stranger in trespass & may redeem of the
 mortgagee -

But the mortgagor is deemed in Equity, & to many
 purposes in Law the real owner of the land mortgaged -
 the mortgagee's right is merely a chattel interest
 a security or pledge for the debt -

Mortgages

Nov. 109.

2 Dec. 978. in the mortgagor - He gains a settlement by his

Nov. 15. 76. 92. 124

113. Aug. 610.

694. 2 Feb. 61.

2 Oct. 274.

30. Nov. 341. "real estate"

Hence if a freehold is mortgaged the reality remains
 power & his interest descends to his heir, & will
 have in a devise under the description of "lands" or

Nov. 113. 1 Oct. 665

It may be conveyed like other real property,

3 Oct. 723 -

Nov. 75.

But if the mortgagor in possession commits waste
 Chancery will issue an injunction in favour of the
 mortgagee, & this even where the mortgage is
 of a term for years only -

The Interest of the Mortgagee

His interest considered at four periods -

- 1st Between the execution of the deed & the forfeiture.
- 2^d After forfeiture & before he takes power.
- 3^d After he takes power, or the eviction of the mortgagor.
- 4th After foreclosure. - (of these last.)

Nov. 77. 80. 228.

2 Feb. 156.

1st Before forfeiture mortgagor's interest continues

as it was at Com. Law before the interference of Chancery

The legal title is in him to the whole interest & is

releasable & ut antea - may take immediate possession

Nov. 156.

Dec. 61. 423.

For before forfeiture Equity has no cognizance of the

transaction - Hence any conveyance, lease &c of the

Donp. 22

Nov. 80. 76. 100.

or voidable -

same lands by the mortgagor during this period are void

as 1st mortgagee

Mortgages -

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hence also mortgagee may on notice compel mortgagor
Dow. 80. to pay him the rent even before forfeiture
Dow. 266. This rule holds even if the lease is prior to the mortgage
i.e. the rent due before notice as well as afterwards
not that which has been once paid the mortgagee.
Lucan - Can he in the last case recover rent due before
the mortgage?

When a term for years is mortgaged by the lease
the mortgage is in the nature of an assignee of the term
Dow. 85. q. n. i.e. if the whole term is mortgaged. But in this case the
2 Ken 275. mortgagee is not liable on the covenants unless he
274. takes actual possession - For 'tis a mere security, not
Dow. 438. intended like common assignment as a disposition
444 not. This rule holds tho the mortgage is forfeited -

Dow. 92. But if the mortgagee in such case takes possession he
2 Ken 105 is liable on all the covenants which run with the
land, like other assignees for he enjoys the profits

Dow. 92. 113. 178. Mortgagee has after forfeiture & even tho he
Dow. 610. 574. recovers in ejectment & takes possession only a chattel
interest according to the Law of Equity - tho only a security
the mortgagee is the real owner -

Mortgages—

How. 170-1. 2 Vent. 351. The interest will regularly not pass in a devise under
 1 do. 3. 2 Vent. 351. the words "Land", "Tenements", & "Hereditaments"
 Geo. Can. 447. 450
 How. 189. &c.

He is considered in Equity then as having only
 a Chattel interest, till after Foreclosure, & on his
 death it goes to his Ex^r not to his Lin

How. 358. 453-4. Hence the assignment of the debt (as the Bond
 10. 11^m 458. - carries his interest tho he does not assign the
 1 Root 248. mortgage deed - is decided in Com

Hence also he cannot before foreclosure do any
act of ownership which will injure or incumber
 the mortgagor's right - e.g. mortgagor being ex
 able to redeem on payment - answer, that the mortgagor
 has leased the Land & that the term is not expired
 is insuff^t - Locus the mortgage might always
 prevent a redemption before foreclosure -
 Mr. La Chancelor said however in the last case
 that the mortgage might lease for years before
 foreclosure, so as to bind the mortgagor to avoid
 an apparent loss & from mere necessity -

How. 98.

Mortgages.

19
229

He regularly neither may the mortgagee over

Par. 94. See before Foreclosure commit waste according to
2 Kerr. 392. the Law of Equity. He is liable to an injunction
592. —
30th 783. tho not to an action at Law —

But if the security is defective, mortgagee in
Par. 95. See will not be restrained from committing waste
before Foreclosure

And in all cases in which he actually commits
waste he is accountable to the mortgagor to the
Par. 95. value of a bad he has taken from the Freehold i.e. it
30th 783 is applied towards the discharge of the debt first to
the interest, then to the principal - e.g. the cut
timber —

But tho the mortgagee cannot incur or
waste the estate before Foreclosure to the injury of
the mortgagor, yet he is allowed such expenses as he
Par. 95. incurs in necessary repairs; & may add them to his
30th 512. 4. principal to carry interest.
1 Wils. 34.
2 Kerr. 84.

If a mortgage be made of an estate to which
Par. 96. the mortgagor has no title & afterwards the true
2 Kerr. 11. owner conveys to the mortgagor or his representatives
W. R. 760. the mortgagee in equity will have the benefit of the last conveyance
a map on the old stock —

Mortgages

1. Pow. 97-8. If the mortgagee of a term procure a new one after
 700. O. C. 432. the expiration of the old, this will be a trust for the
 mortgagor & Redeemable -

Pow. 98.
 322K. 515.

Mortgagee is not bound when in possession to
 expend money except for necessary repairs - tho'
 if he has expended money in defence of mortgagor's
 title he may add it to the debt, & it draws interest.

Pow. 99. 100
 20. 11th 146.
 Ch. 66. 591.
 572.

The mortgagee takes the estate subject to the
 same incident to which it is subject in mortgagor's
 hands - ergo a forfeiture of the ^{estate by the} mortgagee & discharges
 the mortgagor's lien - ex. gr. But for life mortgages
 in fee this is itself a forfeiture -

Pow. 111.

Lo of a forfeiture afterwards in favour of
 remainderman or reversioner - occurs in case
 of forfeiture to the crown for treason &c. For the
 king takes only what interest the offender has

Mortgages - Of The Equity of Redemption & who may

claim it

The equitable interest remaining in the mortgagor
after forfeiture is the Equity of Redemption
Pow. 14-15.
156.

This interest is called a trust for the legal title is
in the mortgagor, who is considered as trustee for the
1st 606 mortgagor of the inheritance till foreclosure.

as the mortgagor may at any reasonable time
redeem by paying the debt & interest, so may any person
claiming an interest under him in the Land e.g. if
Pow. 108.
Ver. 193.
Eq. ca. ab.
315. makes a voluntary deed to B, & afterwards mortgages to
C, tho the deed is fraudulent as ag^t C, it is good ag^t A
eigo B may redeem of C.

So if mortgagor becomes a bankrupt his assignee
Pow. 108.
166/Car. 71. may redeem.

Pow. 109. 109. 22 So mortgagor's tenant may redeem -

Pow. 109. 110. 33. pp. - So the assignee of the mortgagor

So after the mortgagor's death his heirs may redeem
Pow. 109.
Ver. 204. for the Equity is in his by descent.

(And an equity of Redemption is governed by the
same rules of descent as if it were a legal estate e.g.
at com Law it descends to the eldest son. If within the
Custom of Borough English to the youngest - according

Mortgages

Nov. 102. Ms. 344. to the custom of Jewry kind to all the sons; by our
own Laws to all the Children equally

Nov. 109. A. R. 190. 21. 1875. To the Decease of the equities may reduce

See 109, 111, 3, 4, 260. To a Judgment creditor of the mortgagor may

Ver. 399. 2nd alt. 440. 2nd sec. 200 cen. For the judgement in a Lien on his estate
360 to 440 nearly

3 Bl. 42c.

No such line in Lon. But mortgage's credit.
Laming lived on the Land may redeem

In Conn. it has been the practice to levy exor on the Equity of Redemption, appraise it, & sell it off (i.e. the simple equity of Redemption) to the mortgagee's creditor. This was considered as vesting the mortgagee's right absolutely in his creditor. This mode of appraisal lately exploded by Sup^{ts} & the exor is according to several decisions of Sup^{ts} to be levied & the land appraised without any regard to the incumbrance. For the appraisers cannot take the account nor settle of the Land - Creditor then is considered as a second mortgage (not as an assignee) - & may redeem as such - But the acc^t is to be taken by the M^r in his petition to redeem & mortgagee may redeem of him - But these decisions of the Sup^{ts} are now overruled & it is settled that taken all the

Mortgages—

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Sup. Ct. Cal. June 1869. right of the mortgagor is appraised to the creditor on the exon his interest is extinguished

It is Exp. the Crown may redeem where
Pow. 111. the mortgagor has forfeited his estate by committing
Br. P. 222. treason for I construe (alone) —

If a mortgaged estate descends to an inf^t
Pow. 111-12. his guardian may with the direction of the
Re. Ch. 137. Ct of Equity apply the profits to discharge the debt.

The widow of the mortgagor if she has a jointure
in the Lands may redeem, & the her jointure is on
Pow. 112-21-2. part of the Land, she may redeem the whole. So too
Ken. 33. 193. tho it is settled upon her after marriage — and
Eq. ca. ab. 219. if she pays more than a third of the debt, she &
her representatives shall hold up the heir till
Pow. 313-17. reimbursed, i.e. when she joins in incumbering it
18th. ca. 271. for otherwise she is not bound to pay any part
Wren 191. of the debt —

The husband of the mortgagor may redeem as
Pow. 112. tenet by the Country; e.g. as a joint sole mortgagee
— 115.
10th. 603 her estate in fee, & then married &c —

But the mortgagor's wife is not tenet in law
Pow. 321. of the equity of redemption of mortgage in fee —

Mortgages

But in order to entitle the husband to convey in a trust estate there must be a seisin of the freehold during coverture, i.e. an equitable seisin or what is equivalent in equity to an actual seisin of the legal estate at Law — actual possession is sufficient. —

But the husband is not entitled, where there is no equitable seisin; ex. gr. one devises a freehold of inheritance to trustees to the sole & separate use of a married woman; Trustees keep possession — The husband has no control over it — the as to this is a seme sole — here the husband cannot be said to be seized even in Equity — In such case, is actual possession necessary where the trust is not to the separate use of the wife?

A subsequent incumbrancer may redeem of a former one — ex. gr. A mortgages to B; for he has an interest under A in the Land (so in Cony) may a judgment creditor of mortgagee; for his judgment is a lien on the Land as if mortgagee

Pow. 117 & 194 &
2 Ch. co. 170 —

1 Ken 52. 2 Vern 663.

Mortgages —

233

If a mortgage creditor or lender to mortgagor redeems mortgagor his heir, devisee, or assignee may redeem of him — for he has not the whole interest —

Mortgagor may redeem even after a release of his equity of redemption if the release appears from

circumstances to have been made upon a secret trust for his benefit, ex. gr. When it appeared that the debt due was very small compared with the value of the estate —

Con. 119-20
Ch. ca. 107.

If there be a Tent for life with remainder or reversion in fee of an equity of redemption, they are to pay proportionally or redeeming what is one

Part. 112. i.e. Tent for life, one third; & if he is obliged to pay the whole he may hold over till those in remainder

Part. 62.

Part. 121.

Ch. ca. 221.

Part. 44.

contribute: ex. gr. devise of equity to A for life, remainder to B. A shall bear $\frac{1}{3}$ of the debt

And if the mortgage money is payable on a contingency

Part. 121, 442. not arrived, he in remainder may exhibit his bill quia tenet against the Tent for life & compel him to

Part. 442-4. contribute - i.e. to keep down the interest (or this is the meaning that he is compellable to pay his part of the whole debt or quit the power —

Mortgages

If Tenant for life pays the whole debt on redemption & takes a reconveyance & makes improvements & dies, the remainder man &c. on redeeming of his representatives must pay for $\frac{2}{3}$ of the last long improvements but no interest is allowed for the money he paid for he is bound to keep down the interest during the continuance of his estate (as if he were in possession & the debt not paid) and the remainderman can in Chancery compel him to keep down the interest.

Pow. 121. 442.
2 Eq. Ca. ab. 596.

Pow. 121. 44
Gill. R. Eq. 69.

But as to the proportions to be borne by Tenant for life & Remainder man &c. of the mortgage money note this distinction - If after redemption by the Tenant for life, the Remainder man applies to redeem of him during ~~his~~ life, Tenant for life bears one third - Secus if application to redeem is after Tenant's death here his representatives allow towards the debt only so much as his enjoyment of the estate was worth tho' it were but one year -

Pow. 121. 2.
1 Vern. 404.

An equity of redemption of a mortgage in fee is not unsettled at Law, for the estate of the mortgagor is gone at Law - yet to an action at Law.

Mortgages

235-27

by a bond creditor as mortgagor's heir. He may plead
non per descent - But in Equity it is assets & charge

30. 11-341. will order a sale of it for that purpose, & if the heir
Pou. 124, 132. releases it or alienes, he is liable in chancery for the
2 Kern. 61. 1 do. money rec'd or the value to the Cr^r or les.
411. 2 alk. 294

Being equitable assets only all the creditors are paid
28. 111 out of it pro rata, or pari passu, with^t regard to the
rank or quality or their debts: no priority as at com. Law.

In com. all equities of redemption are like other
real assets, assets at Law - may be attached - taken
in exce & proceeded with (ut antea)

If mortgagor is dead are they not sold like other
property?

and even in Eng. the mortgagor's reversion
expectant on the determination of a mortgage for
years is legal assets, & the creditor may have judgment
ag^t the heir with a cesset executio, till the reversioner
comes into power - e.g. a Leut in fee mortgages for

30. 125. 6. 100 years - or a Leut for 100 years, mortgages for 50 yrs.
Kern. 410. in this last case the assets are personal & in the ex^r's
Salk. 354. hand -

Mortgages

But in these cases judgment is of assets quando redemptio
 Pow. 126. Creditor of course cannot by Bill compel the heir
 2 Vern. 61. to sell the reversion. He must wait till it falls -

an equity of Redemption is devisable for the payment
 Pow. 126. of debts - & the debts in this case are to be paid
 412. 2 Atk. 50. hanc passu the estate devised being but an equity

412. 2 Atk. 50. & hence equitable assets. - Horn only a distinction
 was taken - If Lands mortgaged were devised to one
 for the payment of debts generally, they were assets
 equitable; but if the devise was made to the Ex^r
 Pow. 126. 8. the assets were legal, he being supposed to take
 2 Vern. 63. 101. 69. quod ex^r - Now it is otherwise, the ex^r is but

Co. Litt. 112-13. 181. a naked trustee in this case -

I have been told by Mr. Keeper Wright that if
 Lands are devised for the payment of simple contracts
 Pow. 131. 2 Freem. 270 debts & legacies, the debts should have no preference
 2 Eq. ex. ab. 371 because the will of the Testator alone makes the
 Land liable, & the devise expresses no preference
 I enquire - & vide cases contra. 2 Ch. cas 248. 1 Ch. cas
 275. 1 Mod. 117. that a man ought to be just
 before he is counsillous -

Mortgages

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The regularly debts have no priority unless the Lord is an equitable ~~one~~ only, yet a second mortgagee shall have his debt out of the equity of redemption in preference to other ~~one~~ tho his interest is but an equity - the legal estate is in the first mortgagee - for his right is a lien which chance will not take away -

There is no instance in Eng. in which an equity of redemption has been held to be liable to an execr in the life time of the mortgagee - see in Com.

Law. 132. Atk 584-6. There may be a power of fraud of an equity, Co. Litt. 11. 14. 15. 160.
124 Pons. 68. 70. 80. Redemptio - Sem. 6.
213

In Gen^l no person is allowed in equity to redeem unless he is entitled to the legal estate (as, Pons. 68. 70.) i.e. in the equity of redemption - ex. gr. a claiming under a deed by mortgagee's heir gen^l brings his bill to redeem, mortgagee shows a deed of entail entitling another person - It is not permitted to redeem - at his peril he must show that the entail is docted.

But if he is a heir the legal estate is

Mortgages -

Row. 133-4. refuses to redeem, any other person interested may do so.
 Barnard's 20. e.g. Mortgagor being a bankrupt, a majority of the creditors prevents the assignees from redeeming - Here the other creditors were allowed to redeem -

Row 134. So in some cases, if the mortgagor's Lev will redeem,
 Barnard 30. the creditors cannot. Lev, if the Lev will not

The right of redemption being a creature of equity, a bd of equity will always make it subservient to its own rules, i.e. to the ends of justice. He who seeks equity, must do equity - must come with clean hands -

Hence Chancery will decree a redemption in favour of the mortgagor or those claiming under him either absolutely or under certain conditions as the justice of the case may require - e.g. mortgagor applies to redeem on payment if he cannot set aside the mortgage at Law - Chancery will not indulge him in this alternative. If he would do Equity, he must do equity - He must either present or abate his bill before he attempts an avoidance at Law -

anc. 135. m
 2 Kent. 336.
 Ch. R. 176.
 Coupl. 610.

2 L. R. 536.

Mortgages

To also, if the mortgagor Reins previously.

Row. 137. attempted to avoid the mortgage at Law, afterwards
41B
2 Ken 536. applies to redeem, mortgagee is allowed as him
all his costs & expenses on the trial at Law

The mortgagee cannot compel mortgagor
to redeem before the day of payment, yet in
case of a Land Bargain on the mortgagor's Le

Row. 137. 9. will be permitted in Eqy to redeem before the
Ken. 232. time - e.g. where by the increased value of
183. 394.

the Land the rent & profits will satisfy the debt
long before the day of payment -

Row. 129. If power be obtained as mortgagor by Land
2 Ry. ca. 599. pending a suit, it must be restored before there
- 20. can be any redemption -

Row. 139. If one mortgagee Black-acre to secure one loan
2 Ken. 207. 280. afterwards White-acre to secure another, one of which
1 do. 29. 245. securities is insufficient, & the other more than sufficient, he
is not allowed in Equity to redeem the one with the other
1 Ken. 245. So if his Lein applies to redeem -

Row. 139. 40. So if one makes two mortgages & dies, & his Lein
2 Ken. 207. claiming by descent endeavours to defeat one & afterwards
1 do. 245. applies to redeem both both or neither -
1 Ry. ca. 325.

Row. 140. He must do equity - Secus if he claims one by purchase - He
1 do. ca. 23. is then as to this a stranger as to his father's title -

Mortgages, —

ex gr. & ten in fee of Black acre & ten for life
remainder to his eldest son in tail of White acre, mortgage
both. His heir may redeem the former & avoid the
latter.

Per. 120-1. 1 Vern. 336. 339-40. a purchaser of the mortgage shall hold
the Land as if the mortgagor & his heir for the sum
due, tho he gave less — So tho he gave more —

But as ag^t subsequent incumbrances or creditors
he shall hold for what he gave only —

So if there are several incumbrances & the heir
of the mortgagor purchases, the first mortgage, tho
first incumbrance shall not stand in the way of
the subsequent incumbrances, for any more than
the heir gave, i.e. they may redeem of him for
what he gave. For a tor Lor as high as equity.

Per. 141. 2 Vern. 353.

i.e. 40. 475. 1 Eq. ex. as a purchaser; & taking the gain of the latter to
ab. 330-3 Salt. 1545. supply the loss of the former is making both
equal — neither loses —

May not the heir then redeem of the sub-
sequent incumbrance, for the same price
together with his Debt? —

Mortgages -

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Dev. 142.
Rev. Op. 335.
Calk. 159-4.
Rth. 54

So if the heir, trustee, ex or agent of the mortgagor purchases in the mortgage or debt as in the last case at a discount, the mortgagor's creditors & even legatees shall have the benefit of the discount.

Dev. 143.
1 Km. 49.

But if a stranger or wife of the mortgagor heir or trustee purchases an insurance to protect other which he himself holds, he shall be allowed the whole money due, tho he bought for less; the equity being equal, the legal title prevails.

How does this case differ in principle from the above case of a voluntary purchase?

2 Ky. 603.

Talk. 84.

Dev. 143.

342. 2.

Rev. 41. 24th.

If the mortgagor is indebted to the mortgagee otherwise than upon the mortgage, he will not be permitted to redeem on a bill for redemption unless he pays both debts - must do equity - See, Hale on the mortgages bill to foreclose. Dev. 511-15. 2 Ky. 603.

Dev. 144-5.

1 Km. 245.

2 Ky. 603.

10. Wm. 775.

116. 87.

164. 97.

So if the mortgagor's heir would redeem, he must pay any debt due to the mortgagee by bond as well as that secured by the mortgage - for the heir after redemption will be in his descent, & the equity is averted for paying bond debts: circuits avoided.

Besides he must do equity as his ancestor must have done. See I suppose on a bill to foreclose -

Mortgages

3 Talk. 240.

Par. 144-5.

2 Ven. 177.

Rec. Ch. 518.

If a lease for years is mortgaged & then a new debt contracted by the mortgagor on the bond, the Ex^r if he would redeem must pay both. The equity of redemption is assets in his hands.

I suppose if the new debt were not by bond.

But if there are several incumbrances, & the first claim, a bond debt also, it will be postponed to all the real incumbrances whether by mortgage, judgment

Par. 145-8.

2 Atk. 52.

3 Talk. 240. 9 & 4.

1 Ke. 87.

3 Atk. 555.

or statute — a bond is no lien it is a personal charge — It is not the same equity as an incumbrance as against the lien.

Par. 145.

Rec. Ch. 511.

1 Eq. ca. at. 325.

And since the statute of fraudulent devices, the devise of the equity of redemption cannot redeem without paying the Bonds (ut supra) (Stat. 3 & 4 W & M.)

Par. 145-6.

2 At. R. 357.

If the assignee of the mortgagor has a bond debt he has the same equity as the mortgagor & his lien as a mortgagor would have on a bill to redeem.

Par. 146.

2 At. R. 247.

If the money due on a bond were lent first & then a mortgage made, the mortgagor would have the same equity as above, as to both debts.

Mortgages—

35.
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In these cases i.e. where the mortgagor (or his representatives) is Off in Off on a bill to redeem, that Ct will carry the debt beyond the penalty, if the principal & interest exceed it. He must do equity, or Chancery will not interfere — the Ct does not alter the contract — Leas. Semble if the mortgagee is Off. Pow. 1467. 3 Pl. 432. Lalk 144.

But if mortgagee or his assignee to whom money is due on Bond countenance a fraud on a third person, by concealing it; he may be redeemed on payment of the mortgage money only: ex gr. Mortgagee, son being about to marry; his intended wife's father, with a view of making arrangements for a settlement applies to the mortgagee to know what is due on the bond — the latter denies that there is any bond & the settlement is agreed on —

If part of the mortgage money is paid & then a further sum borrowed, the mortgagor on redemption must pay the last as well as the first —

But a purchaser of the equity for a valuable consideration may redeem without paying the bond in the case at large — for having a direct interest in the land (like an incumbrancer ante)

Mortgages

How. 148. Co. Ct. 89. 11. 2.
 Ho. 1107. Ver. 87. His claim to it is higher than one growing out of the
 Eq. ca. ab. 325. 15. personal charge — Mortgagees claim as to the bond is
 248. 668. — good only ag^t the mortgagor & his assets.

How. 148-9. Length of possessⁿ by the mortgagor after forfeiture
 is not of itself & absolutely a bar to the mortgagor's right
 of redemption. Mortgages are not within the Statute of
 Limitations — for possessⁿ of mortgagee as such is not adverse.

But still the Ct of Chancery has imitated the
 Stat. as to consider 20 years (to be 15) possessⁿ by the
 mortgagor after forfeiture as prima facie a bar
 to the mortgagor's right. (Stat. Con. 254) The presumption
 is that the mortgagor has abandoned his right of
 redemption (idem) So also the difficulty of making up
 the account is an additional reason.

This presumption is removed by such circum-
stances as account for the delay of redemption, and
 disability, as infancy, coverture, insanity, imprisonment,
 beyond seas at the time of the right accruing. So also
 by facts showing the relation of the mortgagor & the mortgagee
 by the mortgage within the above period, e.g. paying arrears
 or the making up the acc between mortgagor & mortgagee.
 Thus also the difficulty of taking the acc is removed.

How. 149. 55. 1. —
 2 Kent. 540
 4 ut supra.
 1 Ch. R. 194

How. 149. 4. —
 2 Rtk. 333. —
 2 Tem. 416. —

Mortgages, -

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Power 149. removed is said to be the same as that prescribed in the Stat. of Limitations for making entry viz. 10 yrs in Eng 5 in Can.

Power 151. But if a fraud has been practised on the mortgagee to prevent redemption, no length of time will bar his right, e.g. Deed made absolute on condition that the redemption should be with the mortgagor's own money

2 Atk. 333. Power 152. But if 20 years (in Can 15) have elapsed to run, the intervention of any of the legal disabilities (but when) in the person having the right of redemption will not prevent the bar - e.g. forfeiture accrues & mortgagee takes possession while the owner of the equity is under no disability; here the Stat begins to run after this the equity descends to an infant &c

Power 153. 1 Ken. 418. But when it is agreed that the mortgagee shall take possession & hold till he is satisfied, length of time is no bar - Mortgagee's possession is no evidence of mortgagee's abandonment. 30 years possession - holds no bar. This seems to be like a running stream.

So in the case of a meliorated mortgage, even where the money is to be paid on a given day in a certain year

Mortgages-

Cor. 151.4
2 Ken. 701.
R. G. 433.
10 pp. 291.
2 Atk. 343.
4 Br. & C. 363.

on the same day in any following year, length of the mortgage power is no bar, even at Law. There is no occasion for the assistance of equity, mortgagor or his heir may redeem at law in any year.

5 Br. & C. 144.
Cor. 158.4.
1 Br. & C. 309.
5 Ken. 505.
2 Eq. ca. ab. 595.

any act of the mortgagee by which he has recognized the mortgagor's right of redemption within 20 yrs in Cor. 151 will prevent the bar: e.g. receiving the money in case the mortgage should be redeemed; having exhibited a bill to foreclose - So the mortgagee having agreed within the time to purchase the equity of redemption he -

Cor. 160. 2 Atk. 140. - Time is no bar if the mortgagee submits to be redeemed.

Cor. 160-1. The mortgagor if in power is never bound by lapse of time -

Stat. 4 & 5 W. 2. May deprives the mortgagor of the equity of redemption where he is guilty of a fraud in concealing prior incumbrance, & gives an absolute estate to the mortgagee. (no such rule in Com.)

1 Eq. ca. ab. 326-5.
Cor. 162-3
2 Ken. 589.

a second mortgage of the same land is considered as a mortgage of the land itself, not of the equity of redemption if it were the mortgagor could not redeem the first, till he has redeemed the second.

Mortgages

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of a Devise of Lands mortgaged

The interest of the mortgage like that of the mortgagee

Ans. 166. is devisable, & the devisee may have a decree for
184. R. 39. a foreclosure —

Formerly it was helden that the whole
of the mortgagee's interest in a mortgage in fee
forefeited, could not pass in a devise, under the
words "all my mortgages", but the devise would
have at most an estate for life only, for the
mortgagee's interest was then deemed a fee simple
& the words are not such as are required to carry

Ans. 167. a fee — It was indeed questioned whether they would
Per. Can. 447. carry even an estate for life —
449. 450.

But now undoubtedly the mortgagee's interest
Ans. 170 being deemed a chattel only, the whole of it would
21 Barr. 978. pass under such words — & conter it will regularly

not pass in a devise under the words "lands", "tenement",

10 Barr. 174. & "hereditaments" if the testator had other property to
2 Barr. 521. which the words might with propriety be applied. And
1 Barr. 3. words are not proper to designate a chattel interest —
2 Vent. 357.
264. ca. 57.

Mortgages-

But if mortgagee had no other property answering this description - in point of situation & circumstance a mortgage may pass under those words. ex. gr. "All my lands is in A" when he had no other interest in lands there - His intention governs -

Pow. 175.

Barnard. 454.

2 Eq. ca. ab. 666.

If mortgagee devise his interest, the devisee may have a decree for a foreclosure, not as the heir of the mortgagee, but only as mortgagee & his heirs. Mortgagee's heirs need not be made a party, for he has no interest - It is devised away -

Pow. 175. 485.

1 Cl. R. 33.

1 Eq. ca. ab. 318. 5.

Pow. 176-7.

Barnard. 259.

2 Alt. 113.

A Devise by the mortgagee of money due on a mortgage does not carry the interest due on the Testator's death - ex. gr. "£1000 secured to me by mortgage" if the intent seems to be to convey a sum certain not uncertain - Suppose the devise were "till the money due to me is" or "of such a debt secured".

Quære, whether mortgagee's interest will pass under a devise not attested according to the Stat. of Frauds in Eng. or our Stat. of Wills. Lord. it will. Never expressly decided. "Lands & tenements" are the words in the Eng. Stat. "real estate in" in our Stat. in

Pow. 1789.

2 Burr. 978.

1 How. 68. 89.

East. 79. 81. 35.

3 Mon. 266.

Mortgages-

of priority of Incumbrances - of Tracking
prior ~~to~~ subsequent incumbrances.

When are several mortgages or incumbrances
on the same estate priority takes place according to
the date of the respective securities. The first is preferred
to the second, & the second to the third &c, & in this
respect they stand on the same footing in Eng with
Judgements Statutes & recognisances, incumbering the Land
Qui prior est tempore potior est jure -

But the priority is under some circumstances
forfeited, & a prior incumbrancer is postponed to a
subsequent one: This happens, first, when the
prior has been guilty of any fraud or neglect
affecting the interest of the latter. - & then the
subsequent incumbrancer purchases the legal estate to protect
his own. This is called Tracking.

II. If the first mortgagee by fraud or artifice conceals his
mortgage to induce another to lend money on the same security
the latter gains priority. i.e. mortgage is present when mort-
gagee agrees to give a second mortgage to A. & makes no
mention of his own.

Mortgages

Coar. 188 H.
11 W. 393.

1 W. 6.
1 W. Ch. 337.

This rule J.G. thinks
is not obtain where
deeds are required to
be registered, then
registries are constructive
fine notice to all others.

1 W. 187 H. 1 W. 300.
1 W. 186. 30 W. 280.
1 W. 755. 32 S.
2 W. 337. —

1 Bro. Ch. 269. 2 Bro. 486.

1 W. 189. 190.
2 W. 554.

So if the first mortgagee is a witness to the second mortgage, & knowing the contents does not inform, the second will gain Priority — and it is said that the witness shall be presumed to know the contents & that therefore the first mortgagee in this case would lose his priority unless he proved the contrary. See Hardwick & Threlton along this rule and J.G. thinks, correctly.

So if the first mortgagee is guilty of any neglect in the consequence of which another is encouraged to advance money on the same security — the first is postponed — e.g. The first mortgagee in Eng. leaves the title deeds

in the mortgagee's power, who makes a second mortgage & delivers them to the second mortgagee — the maxim is "where one & two persons must suffer by the neglect of one of them, he who is the procuring cause shall be the sufferer." Mortgage the title deeds in Eng. creates a Lien on the Lands which ^{will be} enforced in Chancery by compelling a sale. Here J.G. thinks it would have no effect.

If one who is about to lend money on a non-specific security applies to a former mortgagee to know if he has a mortgage of the Land, & the latter denies the fact he loses his priority, provided the second mortgagee at the time of applying for information informs that he is about to lend money to the mortgagor in the same security.

Mortgages

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¶¶. Tho where several equitable interests affect the same estate, they have priority according to the periods at which they commenced; yet the rule admits of exceptions. where one of the ^{subsequent incumbrances} claimants obtains the legal title, he may ^{for the protection of his own incumbrance.} make of it all the advantage that the Law admits of; of course he may protect his equity with it ag^t the other claimants. For where the equity is equal the Law must prevail, viz.

Row. 190. 4-54.

¶¶. 240. Three or more mortgagees, the last paying Cent his money upon valuable consideration & with notice of the intervening incumbrances, may by purchasing the first title obtain a priority to the others.

Row. 195. 247.

228. 149.

16th. ca. 201. 35

16th. ca. 187. 2/60.

573. 2/60. 397.

Que. Ch. 225.

1. For. 313.

20th. 53. 14. 3/60.

2. For. 573. 2/60.

Row. 195. 212. 31. 37.

Wem. 188. 2/60. 574.

For. 2. 1/60. 339.

¶¶. 188.

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¶¶. 188.

This proceeding is called tacking legal & equitable title one title, only equitable on the other. Tabula in naufragio. Fear of the bad notice at the time of lending: but notice at the time of tacking the mortgage is not material.

At any rate, notice at the time of purchasing the prior incumbrance does not affect the right. When one of the honest claimants must lose, such had a right to secure himself by legal means. A subsequent incumbrancer may tack in this way not only the first mortgage but to any other incumbrance to.

or title which carries the legal estate, viz. On tacking, Form, a judgment, statute, i.e. they being prior to the first mortgage there he may obtain a preference to the first mortgagee.

Row. 198. 244.

2. Kers. 277.

18th. 49.

Mortgages

Enc. 299.
1 Hen. 40. In these cases the subsequent incumbrancer holds as the
intermediate till paid his own debt & the money advanced
due on the purchase ^{incumbrance} in the arrears of interest on both.

7 Hen. 40. Is the rule that equitable interests have priority,
according to the bounds of their commencing admits of ex-
ception, where one of the parties has more equity to
- the legal estate than the others, tho' it is not
- actually vested in him: ex. gr. a subsequent incumbrancer
contracts for the legal estate (as a prior judgement)
& is bound to pay for it, tho' it is not assigned nor paid for.
He is preferred. Ex. gr. contract to convey is in
equity equivalent to an actual conveyance for
equity considered as done prior as done in fact. (ought to be an
equity considered as done prior as done in fact.)
If only of the estate comprised in latter mortgage, it
will protect the latter as to that part only; ex. gr. A
seizes of 60 acres, mortgages 20 to B, then the whole to C.
& then the whole to D. D purchases the first, D gains
priority as to the 20 acres only, but C shall nevertheless
that part with paying all that is due on the first &
last mortgage --

But if the first incumbrance bought in contains
more than the first mortgage, the first mortgagee
shall hold the whole, till both debts are paid --

Enc. 21.
2 Kent. 339.
1 Bl. ca. 162.

Enc. 21. H.
1 Bl. ca. 201.
134 ca. ab. 323.

Mortgages

253.

ex. gr. two first mortgages are of 60 acres, a third of 20 only, the third by buying the first shall hold the whole

So if a subsequent mortgage purchase in a prior "satisfied" judgment, that term, mortgage is prior 214. which can be made use of at Law to gain priority as above - 1 Ken 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

but where there has been no release of the - is meant one paid off after completion. By a satisfied conveyance is meant by the mortgagee that the judgment is meant I suppose a judgment paid, but not discharged, as where there is no other than a satisfied term is meant one made for certain purposes which an equitable relief - an satisfied before the term expires by its own limitation & mortgage has not been released.

1 Ken 211. Ch. ca 35. The last rule holds the no consideration rule. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

So the prior incumbrance were obtained by fraudulent means; as where the subsequent mortgage came into a man's hands, & with leave, look after satisfied Statute. I think, this is carrying the rule beyond the true principle, but it seems so settled. But where the prior incumbrance is deficient in legal requisites it will give no priority to the subsequent mortgage, even judgment not docketed as regards

1 Ken 215. 2 Ken 234. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763.

Mortgages

The subsequent mortgagee can take no other than the legal estate to his mortgage: e.g. 4th mortgagee purchaser in the second, no priority gained — his original mortgage is still postponed to the third —

a creditor by judgment or Stat. cannot by purchasing a prior mortgage gain a priority to the intermediate mortgagees. For he is in no sense a purchaser; he has only a good lien — he does not ^{which is always superior to} as specific lien. Lend his money on the credit of the Land as a pledge.

& so has not an equal equity and one not having it cannot gain priority by purchasing the legal estate prior mortgage purchased in will give no priority unless it is perfected (i.e. I suppose at the time of the sale) for before that time the estate remains as at com. Law, defeasible &c, so that the legal estate may be divested by the mortgagee —

So if there be two mortgagees & the first make a subsequent loan (taking a judgment for security) he may take this to his mortgage — ^{if he does not take a judgment} But if the prior mortgagee in the last case has notice of the intervening mortgage at the time of lending more money upon judgment he cannot take a second mortgage — he is not equal

18 O. 773.
2 O. 195.

20th 347.
Pow. 20th 491.
20th 491.
20th 491.
Or. 6th 310. 494.
18 O. ca. 325-10.

Pow. 20th 491.
20th 491.

Pow. 20th 491.
20th 491.
20th 491.
So if he does not take a judgment

Pow. 20th 491.
20th 491.
20th 491.

Mortgages -

2557

Par. 234. The same rule obtains where the subsequent mortgagee purchases the legal estate to protect his own incumbrance. He cannot tack if he had notice, *ut supra* -

is in the rule laid down but it is not inconsistent for Equity will compel a good prior conveyance is defective, hence a subsequent mortgagee with notice shall have priority; *ex. gr.*

Par. 204, 232. *to A.* mortgage by defective conveyance, then to B. who had notice *ut supra*; for the legal title is in *per se* in B. *Eq. 7* will give force to an executory agreement. But a defective security will be enforced in Chancery. *subsequent purchaser with notice.* *ut* Creditor who have only gen. not specific, liens, as

Jack. 449. Judgments Creditors. They did not originally take the Land for security, & they come in under the mortgagee who is bound in conscience to make the conveyance good *ex. gr.* proposed to mortgage tho the conveyance is defective.

In *eqt. cred.* Equity is not equal.

If the first mortgage deed contains a clause, making the Land a security for the future loans, such loans will have relation to, & be taken as part of the original contract - *ex. gr.* they will be preferred to any subsequent mortgage *provided* the first mortgagee has no notice of it, when he makes another loan, if the second mortgagee had notice of the clause.

Mortgages.

"In the foregoing case where notice of the interest of third person vices the rule of priority, if notice is charged by one party, it must be positively denied by the other in his answer - scas he is taken to have had notice.

Row. 253.

Pr. Ch. 226.

2 Vent. 381.

2 Per. 450.

30. W. 243.

Row. 254.

2 Per. 450.

If special facts are charged, as amounting to notice, they must be denied.

Row 254

11es 68. 95.

Pr. Ch. 19

If notice is denied in the answer, & proved by witnesses only, the bill will be dismissed; it is not safe evidence of notice. scas of scas.

Row. 255.

20th. 19. 141.

scas if there are many circumstances corroborating the evidence of the witness.

Row. 255.

11es. 77.

11es. Ch. 52.

In this last case if the evidence & circumstances are not satisfactory, an issue is directed in a Court of Law - scas, when there are not such circumstances

=

According to the preceding rules, the right of taking incumbrance depends upon the want of notice in him who would protect his Equity by the legal estate -

It is now necessary to consider what amounts to notice -

Mortgages of Notice -

Row 256. Notice is of two kinds, 1st Actual. 2^d Presumptive -

1st One is said to have actual notice when he is a party to, ^{or sees,} a deed or which shows the fact, or has notice regularly served upon him &c. But a ^{current} flying report is not considered

as ~~giving~~ actual notice: e.g. A, being about to lend money on a mortgage, a stranger to the contract says to him "B. has a mortgage of the same land." If B. himself or his agent the agent would be different.

2^d presumptive notice is a conclusion of Law that one has notice of a fact, ^{where} ~~there~~ ^{direct} is no proof of actual notice: then one cannot make a title but by a deed or which discloses a material fact, he is deemed to have notice of that fact: e.g. a convey to B reserving a power of revocation. B conveys to C, C is deemed to have notice of the power of it to revoke.

If A devises lands to A. subject to legacies &c. & mortgages the lands to B - B is deemed to have notice that the land is charged with legacies - secus, gross neglect. For A devises title under the devise (Idem) assignment of

There is an exception in the case of Testators. Row 260-5. By an ^{of testator's personal property,} ~~1st~~ ^{2^d} - legatee, is not deemed to have notice

Mortgages.

3 Att. 235. of the contents of the will in favour of Creditor & Legatee.
 20. Nov. 148. 150. It would be dangerous. Besides the Purchaser cannot
 2 Ver. 444. know the amount of the debts &c of the anst.
 11. B. F. C. 609. &c.

If a deed creating a prior charge upon an estate is delivered among other papers to an intended purchaser; he is presumed to have notice of the prior charge; ex. gr. A mortgage is made by indenture, & the

Per. 258. &c.
 2 Ver. 384.
 2 Ver. 486.
 Per. 277.

mortgage's duplicate is delivered to a subsequent mortgagee before he pays his money

Per. 268.
 2 Att. 54.
 1 Ver. 387.

If a recital in one deed stating, or necessarily implying, that there is an incumbrance on the land created by another deed, is deemed notice of the incumbrance to the person who has had possession of the ^{equitable} ~~former~~ deed.

Per. 270.
 1 Att. 470. & 22.

And whatever is sufficient to put the party charged with notice upon an enquiry, is deemed notice in equity; ex. gr. Apts. entitled to an estate, found a person in possession when they came of age, & he was not afterwards told of the notice of a lease by Guardian, & that they had ratified it.

Hence it would seem that possession by prior mortgage would be sufficient notice of an incumbrance to a subsequent one.

Mortgages

Power 242 b. Notice to one atty. or agent is notice to himself -
 (Ken. 61-69. ex gr. An agent when about to lend m^y money, or
 2 do. 477/485.
 2 do. 574. mortgage, by notice of a prior incumbrance. Power made him,
 while atty. to another person -

Power 244. This rule holds where one person is agent -
 Wes. 65. For both parties, as is frequently the case in marriage settlements
 and one makes a person his agent ab initio by

Power 275
 2 Ken. 609. agreeing to a contract made in his name by the latter without
 1 Bro. 244. his authority.

Power 280-1. Notice of an act of Bankruptcy will not be
 Talb. 65. presumed ag^t. subsequent mortgagee to prevent him
 2 Ken. 599. from taking the legal estate.

A subsequent mortgagee may tack notwithstanding
 if he has notice of it or
 if some other may think by the
 existence of the an intermediate judgment - for the a judgment is a matter
 only for the J. 283-5.

1 Bl. ca. 35. of record, These persons are not presumed to be conversant
 2 do. 170. of it - To prevent tacking, notice must be proved as in the
 other case.

Enquire whether in Lon. a subsequent can tack
 the same incumbrances being duly recorded? Stat. Con. 417-18.

In other words, whether on fair record of conveyances, mortgagee are
 constructive notice? It seems to be, or is in a dilemma -

Power 285-6. Yet in Eng. it is held that the registry of intermediate
 Reg. ca. ab. 62-115.
 2 do. 209. mortgages in the registering Counties is not constructive - ex gr. of
 the first mortgagee, after a second mortgage registered, advances
 205.
 Power 287-90. a new loan - He may tack. But could a subsequent mortgagee tack over
 an intermediate one - according to Powell's opinion he may.

Mortgages

^{and?}
 Nov. 28th 1792. But a subsequent mortgagee having notice of a prior mortgage
 1 Nov. 64. 3 Oct. 64th.
 Nov. 66th. 2 Oct. 75th. not registered will not gain priority by registering: for he has
 all the notice which the Stat. intended.

Nov. 28th 9. 1 Nov. 64. But a subsequent mortgage registered is preferred to a prior
 3 Oct. 64. 2 Nov. 66.
 425. 2 Oct. 75th. - one is registered, if the subsequent mortgagee had not actual notice
 (and this without taking) at the time of advancing his loan
 (this is because he did not give notice by registering, why then, if he
 does register, is it not notice?)
 A purchaser for a valuable consideration shall hold

Nov. 24th. 315. as a prior voluntary settlement, tho he had express notice;
 Reg. Co. 66. 334-6. by Stat. 27. Prior. - Same rule extends to mortgage
 17th 280. 711. of 4th 59. by Stat. 27. Prior. - Same rule extends to mortgage
 2 Nov. 64. 128. 1. R. P. 332. Aug. 4. 32. 433. Strongly and 14. Thinks pretty cor
 plained of for more advances of his own account. He is made void only
 upon the condition. He sells to one who has not notice the latter is not
 notice of at more. might
 be depending. affected by it - he may tack. he is in the same posi
 tion as if he had taken the third mortgage, without a
 notice of a person purchase, for valuable consideration,
 & with notice of an incumbrance, from one who

Nov. 29th. brought without notice, the last purchaser, tho with
 Br. Oct. 51. notice, is not affected by it - ex. gr. A. buys with notice
 Feb. 18th. 14th. 57th. notice, is not affected by it - ex. gr. A. buys with notice
 Reg. Co. 66. 331. C. 2 Nov. 64. sells to B. who is without notice, who sells to C with
 65. 4 Oct. 125. Rob. Fr. Cov. 502.

To whom Mortgagee's interest, in a forfeited mortgage,
 belongs, on L's Death

Nov. 29th. Formerly there were great doubts whether the
 money due should be paid to the L^r or to the mortgage
 being forfeited - & this distinction was taken - If a
 bond was given - & if the condition of the redemption was
 payment to the mortgagee or his Ex^t without naming the
 L^r, the debt was to be decreed to the Ex^t L^r if on a
 mortgage in fee, no bond or covenant or if the condition

Mortgages

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11 Nov. 170.

Nov. 297. 8.

184. ca. 326. m. 3

184. ca. 88.

Assumption was payment to the L^{or} or Ex^r or L^{or}'s & assigns, L^{or} the money was decreed to the L^{or}.

But since it is a balance & have considered the contract as personal, it is a rule in all cases that the money belongs to the L^{or} the interest being personal, unless the mort-

Nov. 298. 177.

2 Kent 348.

Nov. 299.

184. ca. 283.

2 Kent 2. 187. 220.

page has manifested a contrary intention. e.g. If he has foreclosed or obtained a release of the Ex^r's receipt then & taken actual possession: by these acts he shows his intention to consider his interest as real.

Nov. 299. 301.

For the L^{or} (or Ex^r) came from the mortgage's person? paid - so the payment should accrue to the L^{or}.

Still if the money is made payable to the L^{or} or Ex^r.

Remand. the mortgagor is at liberty to pay on the day of payment.

Nov. 299.

184. ca. 283.

is either of them at his election for the L^{or} or Ex^r performance of the condition & L^{or} Ex^r has nothing to do with the mortgage -

Remand. 49. 50.

The money being paid to the L^{or}, the L^{or} must

Nov. 300. 2.

Recovery to the mortgagor - only a trustee, & L^{or} the

184. ca. 283.

trust is satisfied

5 Burr. 1801.

Nov. 302.

2 Kent 348.

But he may still may be compelled to release or recovery. And if the money has been paid to the L^{or}, he is compellable in balance to pay it over to the L^{or}.

Nov. 302.

2 Kent 354.

And the the mortgage should die before forfeiture, in which case the mortgagor may pay the money to the L^{or} at the day; yet it will belong in balance to the L^{or}.

Nov. 302.

184. ca. 326.

1 Burr. 412.

or Ex^r may by a bill in equity compel payment over of the same several of any one of them may receive the money & L^{or} discharge will be good.

Mortgages -

Cour. 302. 3.
2 Cl. ca. 187.
1 Kem. 412.

The Request of a specific Legacy by the mortgagee to the
Ex^r does not bar his right to the money - ex. gr. £100.

Cour. 303.
2 Cl. ca. 50. 187.
2 Kem. 367. 193.
1 Rep. ca. ab. 328.

So if mortgagee dies intestate, the interest belongs
to his administrator - and the heir in "possession" may be com-
pelled to convey the land to him: tho there are no debts.

Cour. 304.
2 Kem. 193.
1 do. 173. 4.

Tho the mortgagor releases to the heir of the mortgagee the
mortgage being forfeited, yet the administrator is entitled
to that estate i.e. the estate of the mortgagee I suppose
to ^{in the life time of the} ~~the~~ mortgagor is foreclosed, unless the mortgagor
had actual power? -

Cour. 305.
1 Kem. 271.

But if the owner of the mortgage apprehends the
estate to be real, it will be so considered, ex. gr. If a
purchaser under the mortgagee by an absolute deed
is redeemed, the money on his death will go as the
estate intended to be purchased would have gone - for
his intention was to "realize" i.e. to invest his personal
prop^y in the purchase of real estate -

Cour. 306. 2 Kem. 960.
289. 2 Kem. 581.
Arch. 267. -

So if the mortgagee devises his mortgage as
real estate, the heir and the Ex^r of the devisee will
be entitled - Even, I conceive if the devisee shows a
contrary intention in his will - So if money secured
by mortgage is articulated by mortgagee to be laid out in land
& settles on the issue of a marriage, it is bound by the
articles & goes as land ^{purchased} ~~settled~~ according to the article, would have gone.

Cour. 307.
3 Cl. ca. 207.

This word 'articled', is used to signify ~~an~~ ^a executory agreement.

The Ex^t excludes. — wide powers of Pharmacy

If two persons make a loan of ~~stock~~ joint mortgage

Ver. 15. They are not joint tenants, as some purchasers in

Nov. 30th 8
26. 208 Such case would be; but Lents. in Court there is

2/10/258. 18/10/258. no survivors left. This is a presumed ^{intentional} ~~intentional~~ ^{intentional} so if they

30 Nov 1882. 20 Amorcanus intention
2 1/2 733. 2 H. Dies same without

3 reg. 733. ^D foreclose mortgage & then one dec. same ~~without~~ ¹
1 ds 467.

2 do. 55. presumed -

As the wife, her joinings with her husband, in a fine,
may bar her Dower, so in the same way she may in

March, 24th. - Cumbed it with a mortgage tho her right of Dower is

Nov. 31-12-13.
1st Jan. 2014. Paramour & to that of the mortgagee under a mortgage

made by the husband alone during concoctions
Doubtful whether she can bear herself by a recovery with her
husband. A jointure of lands mortgaged may rotten & shall.

Dec 228. Hold over, till she or her representatives shall be paid

Mem. 213. The whole with interest - for she has a right to hold it

Nov. 21, 313-4. Lands disincumbered (i.e. where she has not joined in
1 Ch. ca. 241. ^{incumbering them})

Ans. 3/15/16. If a jointure is prior it excludes I suppose the mortgage where the jointure is after the mortgage - i.e. does not a prior jointure hold in exclusion of a mortgage?

The same rule holds tho, the settled 'vests' in
 articles or be. not executed: ex. gr. after the articles, husband
 mortgages the land to one who has no notice, and son may redeem (perhaps)

Mortgages—

But if a Jointress after marriage joins in a fine & mortgage the Lands, she shall pay her proportion on redeeming it— i.e. one third of the principal & the other two thirds she must keep down the interest during her estate (i.e. I suppose if she is in possession.)

If the first mortgagee lends more money on his old security with notice of an intervening jointure he shall hold it ag^t the jointress, the legal estate being in him & he having equal Equity—

A Jointure settled in mortgaged Lands after marriage if merely voluntary, is void ag^t second mortgagee, though he had notice. Inequitable. 128. 2 D. R. 332. 3 D. R. 452. 633. If the husband before marriage gives the wife a bond, conditioned to leave her a certain sum if she survives him— she surviving may redeem on a Creditors. Such bond is now helden good after becoming his own money.

If he takes a mortgage in the name of himself & wife & dies, she is entitled to it by survivorship, if there assets ~~are~~ ^{been} to pay the debts with it, otherwise her being joined will not avail her—

It is now settled in Eng. that mortgagee's wife is not entitled to Power in the Equity of redemption if she mortgage in fee, and as daughter, redeem

Now 321. - 3. 4 2 Bac 123. 500 408 10th 100. 2d. 525 17th 198. 30. 11th 227. 17th 138. 101.

3 Mortgages

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Br. R. 326. This is considered as an analogy, to a pure trust of which
 1777-78. 1857. Dower cannot be.
 1800-1801

Br. 335-6. 1858. Rule when the wife of the mortgagor was supposed
 1858-59. 1858. entitled to Dower.
 1858-59. 1858.

1858-59. 1858. This rule contemplates the case of a mortgage in fee
 1858-59. 1858. before marriage, for a mortgage by the husband
 1858-59. 1858. after marriage will not affect the wife's right of dower.

1858-59. 1858. Rule established in common in law.

1858-59. 1858. But even in Eng. a wife is entitled to dower in the

1858-59. 1858. version of present on the determination of a mortgage

1858-59. 1858. for life or years; & if the mortgage is satisfied equally

1858-59. 1858. will remove it out of her way: as if husband before marriage

1858-59. 1858. mortgages for 500 years.

1858-59. 1858. of mortgages by the husband & wife of her

1858-59. 1858. freehold & his interest in the mortgage money due to her.

1858-59. 1858. The husband by marriage obtains no other interest

1858-59. 1858. in the wife's inheritance than a freehold during their joint

1858-59. 1858. lives or at most for his own life by the contract. He therefore

1858-59. 1858. cannot make a mortgage of it, binding upon him & his heirs

1858-59. 1858. for a longer period: as if he mortgages for 500 years & dies; the

1858-59. 1858. mortgage is determined. & tho he joined otherwise than by fine,

1858-59. 1858. the mortgage is void at all events, by his death

1858-59. 1858. whether first or last.

1858-59. 1858.

1858-59. 1858.

Mortgages.

(2 Con. Husband & wife may alias or mortgage her
 freehold by deed. Stat. 265.)

Secus, if she joins in levying a fine in this
 way, her Lands may be mortgaged or aliened so as to
 bind her & her heirs.

Stat. 338. re.
 Stat. 41.
 Stat. 375.
 1 Ed. Ca. 46. 61.
 2 Hen. 61.

But acts of the wife (after coverture) amounting
 in Law to a new grant or re-execution will give
 validity to a mortgage made by both or by herself during
 coverture; tho the mortgage were by deed only: e.g.
 directing her in power to attorn to the mortgagee
 (the deed being in her Land) settling with him the
 balance of rents. Tying him mortgage, & acquiescing
 in his power several years - these are equivalent
 to a redelivery of the Deed -

Stat. 341.
 Doug. 53.
 Comf. 201.
 Park. 10. 154
 2 Off. 127.
 2 Ves. 526.

If the wife joins in a fine to secure a mortgage
 on her estate, which mortgage becomes forfeited the estate
 will be sold not only for the original sum, but if
 a part of it be paid & a further sum borrowed, for that
 sum also. For mortgagee has the legal title & as much
 Equity to have his money as the wife has her Land -

Stat. 42.
 1 Hen. 41.
 2 Ed. Ca. 981.

If the wife's Land is mortgaged to secure the husband's
 debt, his person's property or estate shall be applied in
 discharge of it tho the wife levied a fine, tho exclusion of

Stat. 343.
 10 Hen. 204.
 2 Hen. 604.
 589 -

Mortgages

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The wife incumbers her jointure by a fine to secure the
 Pow. 346. husband's debt, yet she does not by this absolutely part
 2 Bl. ca. 167.
 1 Kem. 23. with it - When the incumbrance is paid off there results
 a trust for her in charge to have her jointure.

If the wife joins ^{in a fine to} ~~incumbers~~ her own
 estate, to disincumber the husband's & he dies, she is
 Pow. 346. considered in charge ^{against} as to his heirs as standing in
 2 Atk. 384. the place of the mortgage & is entitled to satisfaction
 her husband's
 out of his Revs.

If a feme sole ^{mortgage} marries & when the
 Pow. 346. marriage she husband makes a settlement upon
 11 Myns. 458. ^{to a chose in action.} ^{Hyd. cannot in Eq. make}
 2 Kem. 501. her in consideration of her fortune: This is considered
 Eq. ca. ab. 68-4 a valid assignment of her debt her representatives ex-
 2 Com. - 401. as a purchase of the mortgage; as if her Choses in action
 Pow. Ch. 110. & if he dies she living it will go to her Ex-
 2 Com. 170. ^{equity.}
 Pow. 356. 7. 356. This rule does not hold if same in case of a voluntary
 settlement after marriage - not considered as a purchase. -

Is a settlement after marriage in consideration
 Pow. 344-50 of an accession to the wife's fortune, is not a purchase
 2 Atk. 444. of that accession, there is no contract on the wife's part
 i.e. she cannot bind her fortune.

And if the settlement, tho made before marriage is
 Pow. 350 expressed to be in consideration of part of the wife's fortune
 B. H. 63. it is not a purchase of the rest -
 1 Eq. ca. ab. 70.

Mortgages-

Celle. Reg. R. 70. So an opercatory agreement to settle a jointure is a
 1 Reg. ca. ab. 70. purchase of the wife's fortune (at once) tho' she dies
 Pr. Bl. 312. Pow 352. Before it is made, he being in no default. Actio Dei &c

Pow. 352.
 2 Hen. 68.
 2 Green. 102
 1 Reg. ca. ab. 68.

A settlement by the husband is not a purchase
 but unless if it falls short of the value agreed on, & the
 will hold the mortgage on other property after his
 death even ag^t his Creditors.

Celle. 352. &c.
 Pr. Bl. 412.
 2 Hen. 5th. 1 Reg. ca. ab.
 68. 100. 44. 458.

But the husband is entitled to the wife's mort-
 gages as chores in action, if he reduces them into
 possession during coverture tho' he make no
settlement. ex. gr. If he collects the debt &c

Pow. 41. 14350.
 2 Hen. 402. - 1/6.
 Pr. Bl. 118.

But an alienation or assignment of the
 mortgage is not reducing into possession by the husband
 within the rule, unless it is for valuable consideration
 If voluntary, the assignee has no higher claim than
 the husband himself would have if it were not assigned -

Pow. 24. 8
 10. 17. 1/58.
 3 do. 137.

If the husband's creditors get possession of the wife's
 mortgage so that she is obliged to apply to a Bill of Equity
 for relief, the Ct will not interfere to take their advan-
 tage from them - ex. gr. The interest assigned to the
 husband's assignees he being a bankrupt & all the
 writings being delivered to them - Eq. 4 is equal.

Pow. 261. 3.

Mortgages -

309

But if the Land baron: & the Br. were obliged to
 apply to Eq^y the Ct. it seems would not interfere in
 their favour - Equity is equal in this case also -

But if they would make a reasonable provision for
 her, since the Ct. would interfere in favour of the
 husband himself on this condition - i.e. the assignees
 are entitled to the rights that he had. ^{in favour}
 But Eq^y will interfere as the wife of a

specific assignee of the husband for valuable consideration
 of the wife's mortgage - He gives credit to the
 property - not to the person & so has a higher claim
 in Eq^y than assignees under a commission of Bank-
 ruptcy or than the wife -

Per 380.5.
 2 Nov. 1870.

So an ^{express} agreement by the husband to
 assign the wife's mortgage as a security for

a debt with a delivery of the deed, with land
 2. alk. 20th. the wife in Equity, pro tanto, i.e. to the
 2 C. W. 252. or 354.
 amount of the Debt to be secured -

Out of what Land mortgages are to
be redeemed.

It is a Genl. rule in Eq^y that the sum which
 has been incurred by contracting the debt should be
 charged in the first instance with the payment says
 on the mortgage with the real property the first

Mortgages

Nov. 308. 410. 416.

20k 449. Cy. ca. ab.

200. 311. 44.

Bar. 572. 600. 616.

520. 311. 358.

R. Ch. 61.

applies to the discharge of the mortgage. The Ex: then
if the L^r assets is compellable to advance the
redemption money for the benefit of the L^r
L^r if the mortgagor shows a contrary intention

Nov. 308. 410.

(Not supra.)

And tho. the L^r is unable on the L^red, yet the
may compel the Ex: to L^r assets to satisfy the
debt. — Same rule in favour of the devisee of the

Nov. 311. 44.

R. Ch. 447.

10k 487.

Ex: of redemption — Hancus factus, as the L^r is having
status. Unless mortgagor has manifested a different in-
tent of the mortgagor bequeaths his personal estate among
his relations — still it must be applied to the discharge
of the mortgage; for the mortgagee's claim is a debt
& the personal fund is first liable for debts —

Nov. 347. 305. 386.

R. Ch. 447.

Talk. 54.

2 Nov. 701.

Do. Does the rule extend to any other than residuary
p.p. thinks not. If personal fund must yield
(Cy. ca. 311. 44) or does the rule suppose the bequest in
for it is always subject to the payment of debts.
L^rems "to my relations" in which case the property

Nov. 374.

Nov. 51.

goes according to the stat. of distribution —
L^rems if the L^rator directs otherwise, as if he, by
will, exempts his personal fund.

And tho. the real estate of the L^rator is charged
with payment of debts yet this renders it liable
only ^{upon} the deficiency of the personal which is first
to be applied.

Mortgages

271.

Pow. 375. 6. But if real estate is devised to be sold for the
 11th 51. Rev. 203. 2nd Vent. 116. payment of debts the person's fund is not applied
 1 Rep. ca. ab. 271. the first instance.
 R. Bl. 451. in ~~the first instance~~: ex. gr. Mortgagor devises his
 real estate which includes his Equity of Redemption
 to a third person's estate to B, & charges both with
 his debts - personal first applied to all debts -
 Secus if the Equity of Redemption were devised
 "to be sold to pay the mortgage -"

>
 = And the rule, that the person's fund shall be
 applied to discharge the real estate is never allowed to operate
 in favour of the heir to the prejudice of simple contract
 Par. 385. 6. creditors or joint legatees (tho it holds in favour of
 the heir as agt Ex' & residuary legatees.) On the contrary
 if the specially creditors resort to the person's fund &
 exhaust it the simple contract Ex' & gen' legatees may
 resort in Eq.^y to the real estate pro tanto.

Is that simple contract Ex' & gen' legatees are preferred
 to the heir - 'Gen' legatees' seem to be contradistinguished from
 residuary - Qu. Is not this rule, as to gen' legatees, incon-
 sistent with a former rule? That rule relates I suspect,
 to residuary legatees only & arises out of a bequest
 "among my relations." -

Mortgages

The same rule holds in favour of simple contracted Creditors
 & general Legatees as 'mortgagor devisee'; i.e. residuary
 devisee (see infra). It holds in all cases in favour
 of the Gen. & general Legatee unless the devise is specific.

They may resort to the real estate pro tanto (at once).

But if one devises his real estate, e.g. an Equity
 of redemption) specifically & dies leaving debts & Legatees
 & the specialty Es. exhaust the person's fund, the gen. Legatee
 cannot come upon the devise pro tanto. For the devise
 is specific, & a gen. Legatee never takes from a specific.
 A specific devise seems contradistinguished from a residuary
 "all my real estate" is specific: "the rest of my real
 estate" is residuary.

When the descent is broken & the Lien at Law
 of the mortgagor made to take by purchase under a
 devise, & if the devise is specific will fall within the
 last rule. He is then a specific Devisee - e.g. a mort-
 gagee, that in fee devisees to his eldest son in tail.

On the other hand, the Lien of the mortgagor is
 not entitled to the aid of his personal property specifically devised.
 Money may be the subject of a specific bequest, but
 it must be so circumstanced that it may be identified.

See 319. 324.
 10. W. 678. 403.

See 382-4. 391.

See 385. See 410.
 10. W. 201. 681.

10. W. 386. 693.

Mortgages

273.

Now 388-7. distinguished from all other monies of the Testator; ex. gr.
 1 P. & C. 282. £1000 due on A's bond - Thus the mortgagor devises
 1 C. 44. 127. the equity of Redemption to A & B "in a Day" or a
 certain lease to B, A is not entitled to his legacy to
 disincumber the estate.

But to render a bequest of personal estate specific
 Now 388-39. it must be clear, certain & exactly defined. ex. gr. £1000
 1 D. & W. 509. with more is a general one -

So the mortgagor devises his estate with the incum-
 brances thereupon, yet if there are no other words showing
 Now 392-3. an intention that devisee should take charge of the
 2 D. & W. 388. land & first to be applied according to the above
 1 W. Bl. 252. & 352. distinctions to disincumber it -

And if there appears on the face of the mortgagor's
 will, a clear positive intention that the devisee should
 hold the estate disincumbered, even the real estate in
 the hands of the heir shall be applied to disincumber it -

ex. gr. Mortgagor devises his real estate & an estate for
 Now 393-8. three lives to A this being all his land interest then
 403-5. - he has the reversion of the latter, which is a reversion
 2 Atk. 424. as to them. There is a clear intent to disinherit the heir.

Mortgages-

Par. 410.

Br. Ch. 101.

Par. Ch. 454.

Par. 410-12.

If the mortgagor sell or assigns his interest, the Lien of the assignee has no claim on the assignee's death, to his personal assets to encumber the Land - for the personal estate of the assignee is not increased but diminished by the purchase. Same holds as to the assignee's devise.

If the money due on the mortgage is not properly the debt of the owner of the Equity of redemption ~~where~~ the personal fund of him who leaves it, the estate mortgaged itself shall on his death bear the equity of redemption has not been increased, under. His personal assets are not liable - for his personal fund has not been benefited - ex gr. mortgagor advises the mortgaged property, his personal Lien keeps his own Land as an additional security & this fund is not liable.

Par. 410-12.

Br. Ch. 454-58.

R. W. 347.

Advise the Lender to A, the Devisee shall not have the aid of the personal fund -

of the Interest of Money secured

Par. 411.

by Mortgage. Stat. of Home makes 5 Lb. lawful Int.

4 Br. 225-3.

2 Br. 241, 340, 539.

2 Mod. 307.

Long 203.

7 Br. 184.

in Reg. This is a genl rule that receiving more than what the holder of mortgage receives. This makes the contract void - receiving more incurs the penalty.

Par. 411.

3 Br. 154.

It is said by Lord Hardwicke that if a mortgage is drawn for 5 Lb & the mortgage receives 6, the mortgage is void. This must mean a receiving in pursuance of a private original agreement, or a receiving at the time of the loan amounting to an illegal reservation.

Mortgages

275.

Par. 421. Also Holder by La. Statute that a contract made in Eng.
30th. 727.
11th. 428. in the mortgage of Lands in the West Indies is void if
if more than 5 % is reserved the the rate of interest is higher
cont. made to be performed for
Ord. 34. then the payment in these cases is the made in Eng. I conclude.

Par. 423. There is a distinction in Chan^y. between an agreement
Pr. Ch. 163. to pay 4 % with a clause of increase to 5, if the debt is
Barrow. 481. not paid punctually, & an agreement to pay 5, with a clause of
30th. 520. reduction to 4. the latter is enforced - former not
21st. 516. Penalty is not imposed in Eng.
— 289. —
37th. 432.

Par. 424. Part a Covenant to pay the additional one %
11th. after the interest has accrued.
Pr. Ch. 163. in the last is good in Eng. —
Talk. 449. New cont. is regarded as a rescued loan agreement as a penalty
Ord on Money, 37. (an agreement supra) to raise the interest from

4 to 5 % on non-payment will be good in Chan^y if an
indulgence by way of forbearance be actually given
by mortgagee to mortgagor - not a penalty in

Par. 424-5. this case but a liquidated satisfaction; ex. gr. where
31st. Ch. 58. on non-payment the mortgagor paid the amt to the
11th. 632. mortgagor who admitted it & desired forbearance which
was granted in the mortgagor's agreement to pay the addition.

Par. 434-42. Pr. Ch. 163. Interest upon interest - is regularly not allowed
2d. 331. 10th. 633.

If mortgage arises, with the concurrence of the
mortgagor all the money paid by the assignee & which was due to the
Par. 426. mortgagor, shall be considered as principal & draw interest - the
2d. Ch. 37. 6. mortgagor, shall be considered as principal & draw interest - the
New. 172. 435. this is interest on the original interest - It is in nature

Mortgages

of a covenant between mortgagor & assignee that the latter should pay his debt.

11 Nov. 425. Secus, if the assignee has not p^d the money
1 Eq. ca. a. b. 329. & the assignor is only colorable to load mortgagor with
compound interest, though by agreement with the
mortgagor.

11 Nov. 425 - ci. 126. The account between mortgagor & assignee as
11 Nov. 158. to the amount of the debt is not conclusive on the
mortgagor; he is no party to it.

2 But an assignment by the mortgagor, to
11 Nov. 425. 30th. 27. entitle his assignee to interest on interest (ubi ante),
30th. R. 75. must be with the concurrence of the mortgagor -
11 Nov. 168. Secus he takes on the same terms with mortgagor.

3 It was once holden that mortgagor, the mortgagor
11 Nov. 425. 18th. 258. being forfeited, should have interest on interest -
2 Nov. 155. 2 Att. 331. 11 Nov. 652. This rule is now exploded -
11 Nov. 425. R. 116.

11 Nov. 425. 10th. 278. The report of a master in Chancery, computing
11 Nov. 425. 20th. 278. interest, makes that interest principal, the report is
11 Nov. 425. 20th. 278. being confirmed. It is a judgment at Law.
11 Nov. 425. 20th. 278. 11 Nov. 425. 20th. 278.

11 Nov. 425. 20th. 278. But a master acc^t. ap^t. an L^{ft}. or a bill to foreclose
11 Nov. 425. 20th. 278. does not regularly carry interest on interest; for one reason
11 Nov. 425. 20th. 278. for allowing interest on interest, in Court cases, of this kind, is not
11 Nov. 425. 20th. 278. imputable to an L^{ft}. viz. that the mortgagor has been
11 Nov. 425. 20th. 278. guilty of neglect.

Mortgages-

277-

But if the Inf. in ^{on a bill to redeem} ~~Mortgage~~, the acct. taken

Por. 434-7. by the master carries interest on interest. & 81 for 4 Br. D.C. 447. in Chancery in such case is allowed the full benefit of proceedings, into which he is forced by the Inf.

Por. 439-8. ^{as the means of procuring} If an Inf. agrees to pay interest on interest, ^{by giving to himself, and actually does procure it} ~~by giving to himself, and actually does procure it~~ ^{thus procures a benefit}, it is allowed as ^{him} -

Co. Dec. 315. ^{where he was in possession & had no means of support but the interest of property,} But mortgagor's merely buying an acc. ^{or standing interest as principal} ~~where he was in possession & had no means of support but the interest of property,~~

Por. 439. ^{admits that so much is due as interest, does not turn it} into principal. It does not amt. to an agreement for that purpose.

If an agreement at the time of the mortgage to turn

Por. 441-2. interest over into principal, i.e. to pay compound ^{1 Br. 449.} interest, is not binding - it is oppressive - But after ^{2 Br. 321.} interest is become due, such an agreement respecting interest is quod -

Por. 442. If the mortgagor in possession has expended money ^{3 Br. 578.} in defence of mortgagor's title when impeached, he may add it to the principal & it will draw interest -

But for life of the Equity of Redemption is complete

Por. 442. 101 liable by the remainder man to keep down the interest ^{1 Br. 223.} during his estate; & by purchasing the mortgage he ^{Ch. 99 Br. 69.} may compel tenant for life to redeem by paying 7/3 of ^{2 Br. ca. ab. 546.} the debt, or quit possession -

But tenant in tail, in possession of lands mortgaged

Por. 443-24. 445. is not compellable by remainder man or reversioner to keep down ^{1 Br. 477-80. 2 Br. 235.} the interest, nor by the tenant's issue - nor are his representatives after his death. For they are all in the power of tenant in tail

Por. 444. Fine or Recovery, Waste. Under his estate may last Governor

Mortgages.

Our. 444 Talk. 507. Part of Lent. in tail of mortgaged land, is an Inft.
 2 Att. 1127. - & his guardian in law. L. is compellable to
 1 Ves. 477. 480. keep down the interest - for an Inft. cannot bear the
 remainder by fine &c. except, under the king's sign seal.

If Lent. in tail does keep down the Interest
 Remains man shall have the benefit of it, i.e. is not
 1 Br. Bl. 218. compellable to reimburse the Lent. in tail or his
 representatives

If the first mortgagee enters & afterwards permits
 the mortgagee to take the profits without paying the
 interest - still in favour of the second mortgagee
 the profits shall be applied to the first mortgagee's
 interest - i.e. the first mortgagee's interest shall
 not keep out the second mortgagee any longer
 than if the interest had been duly paid - & so
 the second mortgagee would suffer -

If a mortgage debt is secured by land, and
 when a bond is given to mortgagee, the holder
 of it has a right to recover the whole principal &
 interest. For giving up the bond extinguishes the debt -
 But the holder of the mortgage deed has no authority to
 receive more than the interest - because giving up
 the deed does not re-vest the estate. The debt is the
 principal - The mere possession of the mortgage
 deed entitles the holder to a recovery in ejectment

Our. 453. 46.
 Talk. 158.
 1 Ven. 150.
 Br. Bl. 209.
 1 Eq. ca. ab. 445.

Mortgages.

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Par. 454.

1 Eq. ca. ab. 318. 9. If the mortgagee refuses to receive his money after
 forfeiture and tender made by lender, his interest, ^{on the debt} from
 the tender, provided, the mortgagee gives notice of his in-
 -tention to pay, 6 calendar months before hand, &
 tenders the money on the very day which he appoints.
 For otherwise the interest will be allowed - ^{on the debt} Each tender
 will also be mortgagee's or devisee of interest ^{on the debt}.

ut supra.

But in these cases the mortgagee must
 make oath that the money has been always ready for
 3 Geo. 372. 687. the mortgagee, since the tender & no profit made
 20th. ca. 206. of it - & thus the interest will run on (unrecored point)
 20th. Apr. 1798. 2 Eq. ca. 603.
 3. 4th. 96. 2 & his oath may be contradicted -

Par. 455. 2 Geo. 372. And in genl. there must be a strictly legal
 67th. 30th. 90. tender, to stop interest - so that it could have been paid
 2 Eq. ca. ab. 600. ed as a tender at Aug.
 74 - But tender of a Bank Bill has been holden

Par. 456 good where the mortgagee made no objection to the
 Eq. ca. ab. 316. legality of the tender & mortgagee offered to exchange
 3 Geo. 689. it for money if mortgagee wished it.
 1 Geo. 839.

The money being a sum in gross is regularly
 to be tendered to the person of the mortgagee. Tending
 upon the said mortgage absent is not sufficient - i.e.

2 Eq. ca. ab. 610. no place being appointed in the contract - for if
 Par. 457. the time & place of payment are appointed by the parties
 Co. Litt. 211. 4. 212. must be made.
 Co. Litt. 210. 2. ~~not sufficient~~

Mortgages.

2 If no place is appointed in the condition & the mortgagee gives notice where he will pay, Tender at that place is good, if the appointment is a reasonable one & no objection made to it by the mortgagor at the time notice was given -

Law 457
1 Bl. co. 29.
2 B. M. 378.

And in some cases Tender at the mortgagee's house will be sufficient where no place is expressly appointed ex. gr. If mortgagee wilfully keeps out of the way -

Law 457. 1 Bl. co.
- 29. -

But if the mortgagee has doubt as to any legal question arising out of the transaction he ought to have time to consult counsel, before the interest shall stop: ex. gr. Mortgagor presents a deed of reconveyance to be signed by the mortgagee, & contains covenants &c - So if there is a question as to whom the equity of Redemption belongs - for no conveyance ought to be made, till the point be settled -

Law 458-9.
3 Atk. 96.
2 B. M. 603

The interest reserved upon a mortgage may be altered by a parol agreement subsequently: ex. gr. Reduced from 6 to 5 in the case decided, the mortgagee was Off. ^{in bill to foreclose,} it was rebutting an Equity. -

Law 460-2.
6 Br. C. C. 580.

But would such an agreement be enforced in favour of Off. bringing a bill to redeem. J. P. thinks not.

Def. in Eq. may introduce parol agreement to what is in Eq. for the purpose of instructing the conscience of the Chancellor whether he will decree or not and whether he shall impose terms on the Off. or not. For the interpretation of Equity is discretionary.

3 Mortgage.

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of the Method of Accounting.

Par. 82. 464. The mortgage being a pledge, not an alienation,

3 Att. 244. mortgagee has no right to the rents w. till he takes
2 do. 107.

Day. 26. Proven. mortgagee then is not bound to acct. for the
profits during his own possession. - He is to pay interest

Par. 464. But mortgagee must acct. for the profits ^{accruing} during his

2 Att. 534. Proven, i.e. they are to be applied to the discharge of the
1 Rem. 476. debt in nature of Bailiff to the mortgagee. -

Par. 466. If the mortgagee in possession manages the estate
and 897. will not enforce it if inserted in the orig. cont.
1 Rem. 316. himself. He has no allowance for his care & trouble.
3 Att. 518. i.e. he is not entitled to salary or commission for being certainly
2 do. 120. (Pecus. if he employs a Willful Bailiff) - same rule
by entitled to the value of his labor & useful care.
tho. there is an agreement to the contrary.

Par. 467. If mortgagee in possession assigns to an insolvent
or to one who becomes insolvent,
By. can. 328. person, w. th. mortgagee's assent, mortgagee is still
2 Ch. ca. 3. answerable for the profits, before & after assignment -
3 Rec. 658.

Mortgagee is to acct. with mortgagee only for the actual
profits received (not, as the case may be, for the actual value
of the Land) unless it ^{clearly} appears that he might have
made more, but for fraud or wilful ~~neglect~~ ^{neglect}.

3 Rec. 657. made more, but for fraud or wilful neglect.
Par. 467. If he had refused a responsible tenant who would have
1 Rem. 476. a. & he had refused a responsible tenant who would have
1 Ch. ca. 258. given more &c. -
By. can. 328.

Mortgages.

Row 468.

If mortgagor prove that mortgagee let the land at a certain price at a certain time that will be considered as the price during the whole time unless the mortgagee prove the contrary —

But if the mortgagee take possession & keep the creditors out, he will be charged, in their favour, with all the profits which he might have received — e.g. having taken possession he permits mortgagee to take all the profits. —

Row 468-9. 2 Ch. R. 209. Till he is not bound to acct. even with subsequent mortgagee, where he permits mortgagee to take the profits for any profits accrued before he has notice of the subsequent incumbrance —

If the mortgagee permits mortgagor in possession to make use of his incumbrance, (his till deed) to keep out other creditors, he will be charged with the profits in their favour from the time at which they might have had possession —

Row 469. 3 B. & B. 658. but for his interference — e.g. Mortgagee permits mortgagor to use his incumbrance as mortgagor's assignees, he being a bankrupt — this is called *fraudulent assignment* having been in possession.

Row 471. 2. The mortgagee has assigned, & a bill for redemption is brought at the assignee, yet mortgagee must be made a party, that he may recd. for what he has received.

Mortgages.

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Princ. 476. 2.
1 Bl. co. 299.
2 do. 36.
3 Bac. 539.
1 Ky. ca. ab. 12.

If there are several mortgages an acct. stated between the first mortgagee & mortgagor will be conclusive upon subsequent assignees, ^{subsequent assignees,} all the acct. unless fraud or collusion ~~between~~ is proved for mortg. and mortg. interest are presumed to be opposite.

Princ. 479.
1 Bl. ca. 68.

But the acct. between the mortgagee & assignee, will ^{conclude in specie,} not conclude the mortgagor; for the profits are his, he is the debtor & he should be a party to the acct. His interest to reduce the account of profits as low as may be.

An Assignee after several assignments is not bound

Princ. 472. 3. to acct. for the profits before his own time i.e. the former profits shall not be taken into the acct. of him

1 Bl. co. 102. p

2 Ch. R. 392.

They shall be set off ag^t the previous interest accruing while the profits were accruing. ^{Every difficulty seems to be the reason} If the mortgagor, after having endeavoured to defeat of this rule.

Princ. 473. 137.

2 Vern 536

The mortgagee's title at Law, exhibits a Bill to redeem, all that the mortgagee expended at Law, in defending his title, shall be allowed him in the acct. —

There are two modes of stating the acct. between the mortgagor & mortgagee: One is by making annual rents i.e. by applying the annual surplus of the rents & profits over the amt. of the interest ^{as usually} to sink the principal. The other mode is by bringing all the profits into one aggregate sum & all the interest into another — Where there is a surplus of rents & profits the former mode is the more advantageous one to the mortgagor as it leaves the accruing interest each year. —

Mortgages.

Row 474. —
2 Nth. 34.

The rule is that if the yearly rents u. greatly exceed the interest of the debt, annual rents are to be made - How not, or at least, the lender is not bound to apply ^{diminution of the} every small excess to the principal -

Of Foreclosure

Row 475. 2 Nth. 48.

Foreclosure is an extinguishment of the right of Redemption.
proven.

As Chanc. after forfeiture, will, in favour of mortgagee, decree a redemption; so in favour of mortgagee the same lot will decree a foreclosure, i.e. order that under mortgagee pay the debt within a limited time, he shall be forever foreclosed (barred) of his Equity of redemption - which order is irrevocable, except under ^{very} special circumstances

Row 475. 510.

Row 475. 6.
Nth. 34. 388.

If the mortgage is of a reversion, a decree may be had for a sale of the estate to pay the debt. This would not be the regular course, where the estate is one in possession. If a mortgage is made to several, all must be

~~made~~ parties on a bill for a foreclosure. - I.e. if a mortgage assigns to several, all the assignees must be parties. Eq. will not interpose in any question of right, until all the parties are brought before the court. ^{interest, and consequently, all brought before the court.} ~~Eq. will never decree a foreclosure till forfeiture of the mortgage. It cannot.~~

Row 34. 34. 137. 476.
2 Nth. 388. 1 Nth. 232.

Eq. can not aid a defective bill on a bill for foreclosure. The title of the mortgage goes to the in the mortgage. ~~cannot be investigated~~ This must be settled at Law, i.e.

Row 476. 2 Nth. 244.

But on such a bill will not aid in legal title, but will leave it as it is to be settled at Law. But he may have the ~~fact~~ mistake corrected on a bill brought for that purpose. ^{length} decree only destroys the Eq. of Redemption.

Mortgages.

#-
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Mortgagee may pursue all his remedies at the same time

Par. 477.

Sony. 401.

2 Ark. 344. & for foreclosure by his bill in Equity - In Dec. after

judgment on the bond he may lose the exch. on the
equity of redemption and thus extinguish it.
land mortgages - but under special circumstances the

Par. 477 & 8.

2 Ark. 344.

When mortg. takes The suits are not brought for the same cause.
takes more interest in Exch. the value of the Chf. may refuse a decree for a foreclosure when
whole is to be appraised to him, but as a injustice would be the consequence of granting it, ex. gr.
there is only the value of the mortg. interest.

Par. 237. 478.

2 Verm. 271.

Salk. 580.

Mortgagee having notice of a voluntary settlement, joined
the trustees to convey the legal title on estate to him
to protect his mortgage -

"

He is left to his remedy at Law by purchasing
of the trustees he becomes a trustee -

Par. 219.

2 Ark. 287.

"

Mortgagee praying relief ex t. mortgage is equivalent
to praying a redemption for redemption with proper relief.

ex t. upon reference to a master, to take the
act on mortgage bill, he does not redeem by
paying the money according to the order & the

Par. 279.

2 Ark. 287.

W

M M M

Or on the mortgage application dismiss the bill this
disposal is equivalent to a decree for a foreclosure -
Mort. on Exch. is L. off. not Ex. t.
if mortgagee here brings a bill to foreclose it is

Par. 479.

1 Bl. ca. 51.

good cause of demurrer - yet mortgagee ex. is not a party, he
is entitled to the money -

Mortgages.

Nov. 479.
2 Ch. ca. 29.

If it appears on the hearing that the mortgagee ex. or adm^r is not a party - the bill (mortgagee's bill) cannot proceed, tho there is no disclaimer -

Nov. 479-80.
2 Ch. ca. 332

But mortgagee's bill need not be made a party to the bill for a foreclosure: He has not the Eq^y of redemption, (ie. on a mortgage of a freehold) -

Nov. 480. 2 Ch. ca. 56.
1 Ch. 387.

But if mortgagee's bill has obtained a foreclosure, it will be good, tho. the ex. or adm^r no party, for the bill may retain the land on paying the debt to the ex. or adm^r -

Nov. 303. 480.
2 Ch. ca. 193.
307. 2 Ch. ca. 50.
1 Ch. ca. ab. 328.

But if the bill does not pay the mortgage money to the ex. or adm^r of the mortgage, the ex. may compel the bill to convey the land to him.

Nov. 481.
2 Ch. ca. ab. 605.

On a decree to foreclose within a certain number of months, the time is computed by calendar, not by lunar months

Nov. 481.
1 Ch. ca. 217.

A decree to foreclose ten^t. in tail of an Eq^y of redemption - him will bind the issue in tail & all those in remainder over except bill without the equity of redemption - who are no parties to the mortgage - a fine or recovery.

Nov. 483.
2 Ch. ca. 101.

But if there is ten^t. for life of an Eq^y of redemption or remainder over, the remainder man ought to be made a party to the bill for foreclosure -

If there are several incumbrances, some of whom are not

Mortgage ch.

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Power 483. make parties to the bill, till the Off. may foreclose such
2 Nov. 516. as are made parties.

Power 483-92. 3d. 236. But those who are not parties to the suit, are not bound
2 Nov. 518. 683. by the decree. -
185.

When all the mortgagee's interest in a mortgage is
Power 485. devised away, the devisee may bring a bill to foreclose
1 Bl. R. 33. without making mortgagee's heir a party. He has no
1 Bg. ca. 316. 5. interest -

Power 485. 2 Nov. 22. An Inf. may be foreclosed, but a day is given him
Power 482-3. to show cause aft. the Decree, when he comes of age. i.e.
485-6. 2 Nov. 892.
342. 479. 1629. within 6 months afterwards to impeach the bill of
any fraud or error.

Words of the decree "This decree is to be binding on
3 Nov. 148. the D. - unless he shall within 6 months after ss." being
Power 486. served with the process for that purpose "show good cause
to the contrary." - {It is to be served with process on
his attaining full age.
If an Inf. show no cause within 6 mos. the decree

3 Nov. 5. 301. is made absolute upon him. But when he shows cause
Power 486. he may on motion put in a new answer & make
3 Nov. 148. a new defence. - {the answer
2d. 532. 10 Nov. 544.
2d. 401.

3 Nov. 148. The process (supra) is to be served on the Inf. coming
Power 486. - issuing out of Ct. with relation to age
3d. 309. of age. It is a judicial writ, by way of subpoena -
creditor had in Ct.

But when he comes of age, he is not allowed to go
Power 487. into the acct. anew, nor is he entitled to redeem or pay at
3d. 11 Nov. 352. erroneous or unjust. i.e. he may take advantage of any reasons
which existed at the time of the foreclosure, & of which

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Prov. 189-90. if they had then been seized, would have prevented the decree. In some cases it in this way he may open the foreclosure - the same privilege. But it is said that when the Inf. owns the off. Judging without this process.

the mortgagee's proper remedy is a decree that the estate be sold for the payment of the Debt - this time, time with a day after age; for there is no forfeiture, the surplus being his. But even then, if he is decreed to join in the conveyance he must have a day &c.

Cor. 484.
1 Ken. 295. 2 do. 429.
3. Ch. 184. 3 Ch. 175. 504

But if a feme sole, for her ancient mortgage land, & the right of redemption vests in her during coverture, a decree to foreclose is peremptory: she has no day given her to show cause ag. it, as there is to an Inf. - She is under no natural incapacity to act for herself: she has voluntarily delegated the right of acting for her to her husband -

Prov. 188-90.
3 Ch. 175. 357.
1 Hen. 305. 3 do. 412.
4 do. 95. 10 do. 435.

But, tho. no day is given her, by the terms of the decree, yet, it seems that, after coverture, she may avoid the decree, if there is just cause -

Prov. 491.
2 Ch. 175. 450.
3 do. 238.

If mortgagee is guilty of any unfair conduct in obtaining a foreclosure, the Ct. will open it, i.e. reverse the right of redemption, ex. gr. mortgagee obtains a foreclosure pending a ^{bill} ~~motion~~ by the mortgagee's creditors to have the land sold for payment of Debt - it will be opened in their favour -

Prov. 491-9. 9 Nov. 183.
2 Br. ex. ad. 600. 25. 609.
15 Ken. 476.
2 Br. P. C. 544.

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Row. 492. If the mortgagee obtains a foreclosure, after judgment
2 Ch. ca. 179. creditors of mortgagor have given mortgagee notice of
their demands & tendered payment.

Whe. 501. — "Secs. of mortgagee had no notice — Lucena —"

Row. 492. But where a foreclosure is opened in favour of a
2 Ch. ca. 185. subsequent incumbrance, the first mortgagee shall be allowed
all his expenses in obtaining the foreclosure unless, &c.
trusts, obtained by fraud or unfair practice.
The time limited for pay^t. on decree for foreclosure

Row. 493-4. maybe enlarged under special circumstances — ex. gr. of the estate
Barnard. 221. is of much greater value than the amt. of the debt, enlarged
2 Ch. ca. 185. — 37.
sevt. times —

Row. 494. 1 Ch. ca. 63. So where mortgagor was prevented from paying,
1 Ch. R. 253. by a rebellion, time was enlarged —

Row. 494. 1 Ch. ca. Foreclosure is not opened in favour of a mere volunteer;
217. 1 Ch. ca. 137. ex. gr. Deiver: for the mortgagee has at least an equal equity;
& an absolute estate at law —

Row. 150. 405. 1 Ch. 405. It must, that this rule will not hold as against
O. B. 423. a 2d mortgagee, there can be no foreclosure,
18. 1 Ch. 291. 2 Ch. 179. the first at law though he is termed a volunteer
as against creditors for his kindred is a good con-
sideration.

Row. 495. If the first mortgagee having obtained a foreclosure,
2 Ch. 235. at the second, devises the land to the mortgagor, the foreclosure,
1 do. 145. is, in fact,
1 Ch. 278. null & opened in favour of the second, ex. t. mortgagor —
a. 1 Ch. — Second mortgagee's claim on the land is thus revived; the
mortgage deed is a sort of estoppel to the mortgagor.

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Case 496. 500. n.
1 Eq. ca. 24. 1877.
Ca. 36219.

And if mortgagor after having obtained a decree to foreclose sue on the County security ^{as to his having the} ^{pro. facto,} in the event of the foreclosure — decided in law, that

1100. 202. foreclosure, with interest, satisfies the debt — ^{Quare —} ^{strong division for the value of the land is one rule as to the debt due by S.C. & C. & E. of 1822. See note.}

Case 499. 500. 510. n. Foreclosure, regularly, not opened when mortgagor acquiesced, for several years, in the mortgagee's possession.

2 Br. P. C. 11. 2 Rep. 407.
1777. 599. 15 Km. 407.
13. P. C. 114. 300. 375.

under the foreclosure — and, probably, wherever there is a distinct vt.

In Eng. the practice is, it seems, if mortgagor does not pay the debt at the time limited, to make the decree absolute, by a further order. In Am. the first decree becomes absolute, of course, if mortgagor fails to make payment on the day —

If tenant in tail of an Equity of Redemption suffers a recovery or sells part of the land, or a bill to foreclose or compel a sale, the part sold shall not be affected, if the residue is sufficient to satisfy the debt.

Case 510.
1 Ke. 281. —

Ben. Sup. Ct. will not decree a foreclosure, unless the debt amounts, nearly, to the value of the land; hence, one ground for opposing a foreclosure does not exist here — This rule is now exploded —

Brill vs. Lewis

A foreclosure was once opened in law when mortgagor in going to pay the money, according to the decree, was taken sick, on the road, & thus prevented; mortgagor having promised to wait a month longer —

1840

1840

Lenses

Lenses

Lenses

Lenses

Lenses, Lenses,

G. L. Johnson
 Johnson
 L. Johnson
 Johnson

Title to things Real by purchase -

For Orchard's Occupancy Prescription & Forfeiture vide 2 Bl. 261-85.
 To for alienation by matter of Record & by special custom 2 Bl. 246. 383.

1. Of Purchase by Devise

Per. Dev. 13. A devise is a mode of alienation & may be defined to be a
 5 Bl. 494 testamentary disposition of real prop^y, or a disposition of real
 prop^y to take effect on the death of the owner.

as to what a will is vide Lovelace 1.2.

2 Bl. 373. 377 The right of devising existed among the Anglo Saxon. but was
Per. 1.3. abolished on the introduction of the Feudal Law - It being in-
 -consistent with the principles of feudal tenure.

Per. 9.5. 2. Ed. 1. 177. The right was preserved however in some parts of
 2 Bl. 377. 379 Eng. by local custom, or by privileges granted by the Conqueror
 2 Bl. 377. 379

Per. 6. 2 Bl. 374. Years for years & Chattel Interests generally were not affected
 2 Bl. 374. 375 this particular by the Feudal system being personalty only
 could be made at the
 2 Bl. 374. 375
 10 Ed. 78.

The suspension of this right continued for many centuries

2 Bl. 375 From the reign of Hen 2 to the latter part of Hen. 8th but the
 8 Plowd. 44 distinction was evaded by the doctrine of uses. A Devise of the
 use of Land was enforced in Chancery by the ecclesiastics

2 Bl. 375. This practice was checked by the Stat. of Uses 27 Hen 8.
Per. 6. 13-18. Go. L. 11. which transferred the legal estate to the use & then consolidated
Per. 236. them - The distinction between them is destroyed by the Stat.

In the 30th year of Hen. 8th a Stat. enacted that all persons having a sole estate in fee simple, in Coparcenary, ~~in~~ in Common of Manors, Lands &c should have power to dispose of $\frac{2}{3}$

of those holden in Chivalry & the whole of those holden in socage by Devises — This Stat. was explained by 34th Hen. 8. 216-7-8.

Can. 216-375. Hen. 8 — The first of these is called the Stat. of Wills; & now all English tenures except Copyhold, being converted into socage by Stat. 12 Hen. 7, all lands except copyhold are devisable — Further regulations were made as to the mode of making devises by Stat. of Frauds & Perjuries 29 Car. 2. — (1st of which looks L)

Can. 216-375-7

Can. 9

Can. 1. Stat. of Hen. 8. extends the privilege further — We have also a Stat. similar which may devide to the same the clause respecting devises in the Eng. Stat. 1st Hen. 8. Hence the construction given to those Stat. are generally adopted —

The power of devising then depends in Eng. on Stat. 32 Hen. 8th explained by 34th Hen. 8 — The mode of devising is prescribed by 29. Car. 2. Stat. 1st & Perjuries. —

Can. 47-8. 216-376

In Can. the power of devising is given by Stat. enacted in an act relating to the age, ability, & capacity of persons — The mode or solemnity of the instrument is prescribed by an act concerning the witnesses to wills.

Of the Instrument under the Stat. Gen. 8th

a Devise under the Stat. Gen. 8 is an irregular instrument
 being 377. 9. in writing, i.e. those Stat. having prescribed no form of words,
 any writing, ^{in any form,} manifesting an intention to make a testamentary
 disposition of Land, & having the formalities required by
 Law ^{i.e. writing} will amount to a devise under them, provided, such
 intention is not contrary to the established rules of Law

1 mod. 117.
 1 Bl. ca. 248. ex. gr. an instrument in the form of a deed & tho. actually
 made 2. 195.
 3 Mod. 310. delivered as such may operate unless that Statute has
 any such at this day under the Stat. Fraud & Perjury.
 Rev. 15. 16. 8. 882. 3. To a Devise or will may be written at diff. times,
 or diff. pieces of paper, which need not be joined together;
 & they all constitute but one Devise, if so intended. ex. gr.

1 Thom. 57.
 Comb. 174.
 Brown 545.
 Com. 15. 18.
 Pow. 17. 11.
 1 Thom. 545.
 550. 3. One by one instrument devise Blackacre today, by another
 whiteren two years hence - In the last example Devisor
 makes several partial dispositions of several parts of his estate as
 he may do - In this case however the instruments must

Now 18.
 1 Thom. 549. not be declared upon as his first will generally but particularly
 as the Testator made his last will of such a part of his prop^y -

Rev. 15. 19. 537. 540. To also one may make several devises of diff. interests in
 the same estate: ex. gr. Devise of Land to Testator's youngest son
 & his Heirs - afterwards same Land are Devise to Testator's
 wife for life, she paying such a rent to the son - Both
 stand as if made in one instrument - For
 this is in fact only a revocation, pro tanto -

Pow. 26. The devise lost in his absence & not even read
Dy. 72. to him was good -

To it was Holden that if one in extremis had declared his intent to devise by parol, & another with. any direction or authority had reduced it to writing in the owner's life time, it would be a good devise - But these two last opinions were soon overruled - & it was Holden that the devise must be completely reduced to writing during Devisor's life - seems void. ex. gr. If a devise was to be made

Pow. 26.
1 Lev. 79.
3 Co. 113.
Pow. 26-8.
Geo Bla. 100.
Dy. 72. 2 Kels. 345.
1 Lev. 113.
Pow. 28-9.
Dy. 72.
3 Co. 31. 1 Kin. 72.
To J.P. & his heirs upon condition & before the condition was written devisor died, it was all void -

But where Devisor directed several distinct devises & after one was completed, but before the others were written, died, the former was adjudged good -

To it was Holden that a devise might be good in part & void in part - ex. gr. Perivener annexed a condition to the devise without authority, condition is void, devise

Pow. 30.
Dy. 72. n. 2.
1 Kels. 880.
more, 150.
good. - seems where the direction was to devise on condition & the devise was written with condition - but the devise is not written in Testator's life time And this instruction I think perfectly correct.

Signing by the Devisor Holden unnecessary under these Acts. not necessary that his name should appear on the instrument -

Pow. 30-1.
1 Lev. 380.
2 Lev. 35.
3 Co. 79.

Indeed it was Loken that any writing, tho neither signed, sealed nor written by Devisor was suff.^t & that the evidence of one witness was suff.^t to establish it - a decision to this effect probably occasioned the clause relating to devise in the Stat. of Frauds of Interests & Estates not devisable

Prov. 34.

3 Dev. 127.

Invent. 291.

Scame, 291.

Formerly Loken that contingent interests vesting merely in possibility could not be devised under the Stat. of wills - ^{more but vested interests.} It is now clearly settled that they may be - i.e. possibilities coupled with an

Prov. 34. 234. 1497.

Geo. 1. 176. 2. 222.

14. 176. 20. 180. 1. 233-9.

Geo. 4. 41. 2. 350.

84. 90. 4. 40. 248.

Thus, to be a devise in fee simple, if a man is not within the age of 21.

Being disposed to the nearest he right to be introduced as he pleases, during his life this is a naked possibility.

Prov. 35. 6. 611.

Geo. 1. 176. 2. 233-9.

on 387. 405. 2. 161.

178. 7. -

John 32. -

Prov. 2. 176. 35. 7. 8.

10. 176. 334. Geo. 1. 176. 58.

Geo. 1. 176. 41. 2. 176. 150.

Prov. 97. 3. 176. 450.

176. 4. 28.

Prov. 36. 176. 208. 1.

311. 176. 9. 2. 2. 253.

interest, are devisable before the interest vests - i.e. contingent interests.
 ^{years of naked possibilities; i.e. a bare authority, de-}
 ^{pendent on contingency, over the estate of another, the party}
 ^{having this authority having no interest either vested or}
 ^{contingent.}
 ^{is not devisable;}
 ^{not within the purview of the Stat. of Hen. 8. as a}
 ^{Reversion discontinued - e.g. but in tail & reversion}
 ^{from in a lease for life - Reversioner cannot devise}
 ^{the reversion - This discontinued}
 ^{if the owner is deceased at his death it will not pass}
 ^{for the estate per autre vie is not devisable, under}
 ^{Stat. of Hen. 8. for ~~the~~ ^{it} is confined to persons having}
 ^{Land in fee simple. So of an estate for several}
 ^{lives - So of a lease fee or freehold descendible}
 ^{per autre vie - e.g. but in tail granted to it.}
 ^{his devisee cannot devise his interest -}

Cor. 37. 8. 40. But now by Stat. 29. Hen. 8. estates *per autem* ^{it is said,} *viz*
 2. M. 25. Hen. 8. are devisable, unless there is a special appointment.
 Modern and better opinion that ^{it is said,} devisable, the appointment of a special
 occupant ^{after that time} Stat. it seems authorized devises of estates
per autem *viz* - the words are "shall have power to
 make their wills of their lands & other estates"
 which seem to include all estates which may con-
 tinue after the owners death & to which no other person
 has a claim which he (the owner) could not defeat
 by his own act. It does not then include estates in tail.
 vide sec. 2. Stat. Inserted by the 2. sec. of Con. Stat. it seems
 that one may devise any interest, remaining after his
 death, which he might have transferred by deed in his
 life time. Stat. 24.

Cor. 40. 1.
 3 Co. 32. 6.
 10 Co. 81.
 Dignities, Offices, & franchises, they may be
 descendible, no Eng. are not devisable. Not within
 Stat. Hen. 8. ^{They are neither manors, lands, nor tenements.} In Con. Offices are strictly personal,
 except, that, in some cases, they may be exercised by
 Deputy - not devisable nor descendible.

Cor. 10. 45. 6.
 Wood's Inst. 195.
 Copy hold estates not devisable, in Eng. but
^{originally devised by} they may be a surrender to the use of the will, not
 within Stat. Hen. 8.

A right of re-entry on Lands, depending on
^{by the grantor or lessee,} the nonperformance of a condition, is not devisable.
 Cor. 46. 189.
 Wes. 223. 422.
 For he has not the Land till breach of the condition -
 not even a contingent interest.
 no estate in the Lands, strictly speaking.

of the Devise itself i.e. the instrument, & of the subject matter of Devises, within the Eng. Stat. of Frauds, & Con. Stat.

The clause relating to this subject in the Eng. Stat. of Frauds & Con. Stat. enacts that all Devises of Lands ~~&c~~ ^{& tenements} shall be, in writing, & signed by the party devising, ^{or} by some other person, in his presence, & by his express direction, & subscribed, in his presence, by three or more credible witnesses.

Par. 44. t.

2 W. 376.

Con. Stat. enacts that no will ^{or codicil} wherein there shall be any devise of real estate, shall be Valid &c. if they are not witnessed, by 3 witnesses, all of them ^{subscribing} ~~signing~~ in the presence of the Testator — Substantially the

* their marks or
Suff. 8 W. 376. 504.

same with the Eng. Stat. except that there is no Devise made in any or some other express provision made with respect to Testator's signing. ^{before the Statute} ~~thus made~~ and the same rule however is adopted by our Stat. as to signing ^{as expressed} ~~and is assumed~~ in Testator signing I suppose — the Statute.

Par. 44.

The object of these provisions is to guard men, in extremis, ag^t fraud, & to protect heirs at Law &c.

"All Devises &c." No form being prescribed, ^{and} more than in the Stat. Hen. 8. any writing which would have been good, as a Devise, under Stat. Hen. 8. will now be valid, if the solemnities, prescribed by Stat. of Frauds, are observed; i.e. if signed & witnessed, as the latter Stat. requires — Hence, as under Stat. Hen. 8. a Devise, executed according to the Stat. may, by reference to another instrument,

Par. 489.

Devises -

Ambl. 25.

Pow. 59. 20th.

268. 285 -

and if a Legacy is given originally out of Land, the will creates the charge must be executed according to the Stat. Such a charge is in effect a disposition of part of the Land by devise. Diff. from the case of an instrument exposed to in a devise -

Pow. 59.

Pow. 59. 20th. 174.

Revs. arising out of Land are within the Jurisdiction of the Stat. as are growing timber trees, they are regarded as part of the Land. To a will giving a power to Ex. to sell Lands must be executed according to the Stat. For this is indirectly disposing of Lands: i.e. enabling others to do it.

Pow. 59. 80.

The Eng. Stat. of Frauds extends to all Lands & tenements devisable either by the Stat. of wills or by itself, the Stat. of Frauds or by Custom -

Of the Solemnities required in Devises by the Eng. Stat. & Stat. of Cor.

Pow. 6. 25-6.

Pow. 325.

1 Shift. 326

1st The Devise must be in writing - This requires indeed obtained under the Stat. of wills. It is also necessary under our Stat. tho. the word writing is not used - But the provision as to witnesses implies that it must be written.

Comp. 264.

20th. 174.

4 Shew. 1. dubly Law.
1 Shew. 69. 2 Sh. 764.
contra 1 Wils. 313. 1 Vaff. 11.
1 Shew. 225. vide also
Selw. N. 6. 1758. & margin
2 Shew. 1. 1758.

This rule needs no illustration farther than has been given as to the instrument: Sealing the usual is not necessary. 2^d signed by the Testator or some other Person in his presence & by his express Direction - Signing is not express, required by the Cor. Stat. by the Eng. sealing is sufficient.

Devises

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But in the construction of it the rule of the Eng. Stat. as to signing is pursued - Same same as the Eng.

Sealing is usual in Rom. but not necessary either here or in Eng. Sealing in case of Deeds is a General solemnity - mark of distinction between families -

Of Signing. It has been holden that sealing alone amounts to signing within the Stat. - Same point
 Pow. 62. 3 Lev. 1. 3 mod. 219. 8th
 devised 3 & 1. vide also marginal note at bottom of p. 301. holden by 2d. R. 2. Str. 704. Pow 66. 7. holden contrary
 1 Will. 3. 1 Ves. 65. Geo. 2. Pow. 67. 1 Will. 3. 13. Pow 74. The latter seems the better opinion. The former facilitates the forging of Deeds. The former opinion is now overruled.

But the name of the Testator, written by himself, in any part of the instrument, is construed a signing, unless it appears that it was not intended. ex gr. "I, A. B. make &c." can be shown.

But if it appears that the name, written in the body of the instrument, was not intended as a signing, it will not operate as such. As if there was an express intention to sign formally, & that intention was defeated. ex gr. the devise being in five sheets, Testator signed the two first & attempted to sign the others but failed. Will not good.

The onus probandi in this case lies upon him who opposes the devise. The presumption of Law (the intent to devise being certain) is that the name written (not upon) in the body of the instrument was intended to be a signing

Devises

1 Ke. J. 11. 2a. Devise subscribed by three witnesses & declared by Testator in their presence to be his will, tho' not signed by him - holds well - ex officio - Dubitatur. Day. 241.

"Attested & subscribed by three or more credible witnesses" The genl object of this clause is to prevent the frauds consequent upon the secret execution of the will. ^{The presumption is, that the will is made in extremis.} devises - credible - Brown 417. Pow. 113. 16. parts

Testator signs; witnesses subscribe.

The attesting witnesses are to attend to three objects
Pow. 88. 9. 7. First, the Sanity of the Testator. - 2^d the fact of the signing.
do. 80. Thirdly, the fact of publication.

First They are to attend to his sanity or state of mind - For the signing, which they are to attest, includes, in Law, not only the physical act of writing the Testator's name but also the mental power or capacity

Pow. 87. 4. 2. of making a legal & effectual signature - An idiot
30. W. 93. may write his name -

8 Ke. 169. 13. may write his name - or in any other Court,
And, when the devise is offered for probate, the
Testator's sanity must be proved - onus is on the

Pow. 87. 5. 20th. 56. devise. - proving the execution to have been former

Prob. 204. is not suff. - Probate is not conclusive as to any thing which equates personal property only.
Pr. Ch. 385. as to personal property. Hence a B. of Ch. and Y. will not establish

a devise unless all the attesting witnesses are examined; for the heir has a right to require proof
Pow. 110. of Testator's sanity from each of them
30. W. 93. as to giving it in evidence at law vide infra

11.7.

Bull. 264.

Pa. 1096.

book

But the testimony of the subscribing witnesses
for or against the
is not conclusive ~~of~~ Testator's sanity or signing
or even as to their own subscriptions—

As doubtless that they may have the Testator's sanction
Secondly. They are to attest the fact of Testator's

signing — not necessary however that the witnesses

Row. 71-8.

3 Lev. 1.

Co. Pl. 184.

2 Co. Pl. 506.

2 Ke. 455-1da Pl.

3 L. R. 253.

Boy. 225-254.

should have actually seen Testator sign — an
acknowledgement by him to him that his name
appearing upon the instrument was written by himself
This suff. as to this point. 1 Dick. 225.

~~This is the same rule as formerly applied in relation to sealing~~
But Testator's saying this is my will is not

Row. 73. suff. evidence of the fact of signing it seems: it is
2 Atk. 182. not an acknowledgment of that fact—

It seems however that a written declaration
in the hand writing of the Testator, that his name was
written by himself is suff. evidence to a copy of the

Row. 96-8.

Min. 227.

Row. 197.

Row. 20.

36 Pl. 254.

fact of signing it is an implied acknowledgement —
ex. gr. signed re. is my last will &c., &c. &c. whether an
actual acknowledgement is not necessary —

This is not so sufficient in pleading, if deemed to.
Thirdly. They are to attest the publication. As

Row. 80-1.

3 Atk. 156.

publication was necessary before the Stat. of Charles 2
is not taken away by it, his Will Holder necessary —

Row. 80-7.

analogous to the ceremony of delivering a Deed —

By the publication of a will is meant some act
by the Testat. amounting to a declaration, that the

Devises

Row. 81. instrument in his will - no form of publication is necessary.

any act or declaration, importing a solemn intent in the Testator, to dispose of his estate, by the instrument, is suff.
Row. 81. 8 Vin. 125.

Hence delivering the instrument as a Deed
not antia. Has been held a suff. publication - So Holden.

Row. 81. 2. in a case where the witnesses were deceived, & kept -
4 Burr. 6. 2. 117. - bound the instrument to be a Deed -

The law takes notice of the fact that wills are often to be concealed. ^{the law takes notice of the fact that wills are often to be concealed. In this respect it is necessary to the witnesses that is my last}
Row. 82. Swind. 56. office of Execution, Publication.
See Godolphin & office of Execution, Publication.
will is suff.

So publication may be inferred: e.g.

When the form of the attestation was in the Testator's hand writing & in these words: "signed, sealed, published & declared to in presence of us." & he said he meant something by it to them "take notice" Holden a suff. publication good evidence to a jury.
Row. 82. 6. 4 Burr. 6. 2. Law, 114. -

But the publication must be in the presence of three witnesses it seems - at least this is Holden's necessity as to republications.
Row. 604. Com. Pl. 361.

Necessary that the whole will be present, at the time of attestation - If it is in sev'l parts, one of which is attested by witnesses who never saw the other 'tis not well executed -
Row. 84. 3 mod. 263. 1 Bq. ca. ab. 413. No matter if the witnesses were entirely ignorant of its contents

But unless there is positive proof that the whole
 was not present, the Jury may, from the circum-
 stances of the case, presume that it was present
 454.

It is a question for their consideration —
 And I think of our probandi to be either on the best at law than
 on the Devises. As to the Subscription of the witnesses.

Now 89. 90. 101. Holden that if a Deviser is made on three sheets
 108. 882. — not fastened together
 3 Bwn. 1775. of paper & each witness subscribes one sheet, the
 2 Bl. 377. 1 Bwn. subscription is sufficient. The law does not prescribe
 548. Trecat. the place or locality of
 488. R. 61. 185. 276. Court. 37. 3 mod. 260. the subscription.

So if the loose sheets in the last case were

Now 90.

682. 9. wrapped up in a blank cover, their subscription
 is sufficient. I think that this rule is well founded. The only question is, the court, I think it impossible to be in the presence of the Testator. These words
 488. R. 61. 185. 276. Court. 37. 3 mod. 260. the subscription.

2 Bl. 377. Holden synonymous to "within the view" —

If they subscribe within his view, it is sufficient.

Now 90. 91. By the latter word "view" is meant possible view.

Yalk. 395. 638. For if the Testator might have seen the witnesses.

Court. 81. subscribe to the subscription in his presence

1 B. 377. 1 Bwn. subscribe to the subscription in his presence

Doug 232. ex. gr. when he might ^{look} into a gallery through glass door &c. —

2 Bl. 377. ex. gr. when he might ^{look} into a gallery through glass door &c. —

Now 92. So if the curtains of his bed are closed, yet

Yalk. 395. a subscription in the same room, he said is sufficient

because he is in his power to see them. —

Now 92. Not necessary that Testator & witnesses should

1 B. 377. be in the same house ex. gr. she is her carriage

they in the attorney's office. —

Nov. 92-4. Oct. 79. But the subscription tho, in a contiguous
comb. 156. 1 Nov. 89. apartment is not good unless testator might have seen it
Nov. 200. 1877: 239. as being an intervening person which testator could not
Nov. 94-5. 2 Nov. 288. tho, the witnesses refuse to subscribe at the
remove with his hand.
Testator's request, the above rules apply: for this

of H. 377. Par. 8. clause it seems is intended to prevent not only fraud
Doubt. but any mistake as to the identity of the instrument

If the Testat: is insensible, at the time of attestation, tho. corporally present, the attestation is not good. His presence implies in construction a mental presence also; a knowledge of the transaction.

Is the attestation in the same room
with Testator, & he of ^{sound} disposing mind, yet if he
executed it clandestinely;— not suff. — not in his
presence, within the meaning of the Stat. ignorant
of the transaction.

So the witnesses must subscribe in Testator's presence, yet the fact that the subscription was in i.e. present.

S. Vin. 128.

Nov. 28-9.

Don. 2. 31

Bull. 964. Pl. 1109.

In presence need not appear on the face of the instrument. ^{§ 241} Though the instrument and its contents, within the ten years, are a fact for the consideration of the jury, it is not binding on it, as it must be proved. Indeed, if stated in the instrument, it must be proved. If the witnesses are read the jury may presume the fact unless the contrary appears.

Pr. sh. 270. "By three or more witnesses" under these
 Pow. 100. 110. words it has been decided that if a devise is subscribed
 680. 2. by A & B & afterwards a codicil by B & C, the devise
 680. 35. 56. is not signed by three witnesses within the Stat.
 Holt 742. 11. & that if the devise is not witnessed ^{by three}, a codicil with three
 3 mod. 262. witnesses will not make it good — Per. as to the
 1 How. 577. 2 Kem. 577. principle — It does not appear except in one case
 Cow. 680. 2. (Comm. 2. 384) (Pow. 104. 5) that the devise was present
 when the Codicil was executed viz. of L.P. 140. Th-

Obs. 108. 9. decisions however appear clearly to have proceeded upon
 686. 1 Brown 545. the distinction between a devise & a codicil, & a devise
 made at several times & in several distinct parts
 in which last case an attestation of one part is suffic-

Pow. 23. 543. What is the difference ^{for} the will & codicil constitutes
 but one instrument — a codicil I suppose is
 considered as being intended to affect an instrument
 already completed, not to consummate the instrument
 or give it validity — attestation of the Codicil, ergo, not
 effectual as to the original devise. But an attestation
 of one part of the original devise is intended to give
 authenticity to the whole —

• But where there is a will & codicil on one piece of
 paper the question whether the subscription of the witnesses
 belongs to one or both is a fact to be determined by the Jury —

Devises

Case 109.

1 Burr. 554. 5.
or 549.

Case 110-13. 2 Ch. ca. 109.

3 Burr. 1775. 2 Ken. 429.

Ch. Ch. 184. 2 Atk. 177.

2 Ven. 458. 3 R. 2nd ed.

And as to the question whether a subsequent writing, be a codicil or a distinct part of the original devise, it seems that if the subsequent part relates to personally only & is executed according to the Stat. this circumstance furnishes presumptive evidence that it was not intended as a codicil but as an additional & constitutive part of the original devise.

It is not necessary that the witnesses subscribe in case of personally, others presence or at the same time. This is dangerous. Ven. 9. 14.

But it is most safe for the sake of one witness. But's 204. Case 708. is sufficient to prove that all signed in Testator's presence. R. M. 71. 15 Ch. 184. But unless all were present together proof cannot be thus made. & if one is living, the hand writing of the others cannot be proved: vide Case 707. in such case proof that the others signed in Testator's presence cannot be had, unless all were together. - Note the difference between proving the exec & attestation of the devise in a particular suit at Law, which it seems may be done by one witness, & the establishment or formal probate of it in Ch. for which purpose all must be examined - In case the practice is Judge Recum then to call but one to prove -

Case 720. 113.

Case 708.

1877. 741.

1772. 206.

Case 70. 1718.

1 Ven. 177.

Credible Witnesses - I

Devises -

#-
310

"Credible Witness" - (This word not in Con. Stat.)

12th Nov. 47. First, who are such. The word credible seems to be unmeaning; the credibility of the witnesses is never enquired into. If it means competent to unswear -

Nov. 133. competency is implied in the word witness. ~~competent in fact~~ the credit of the witnesses is no part of the right unless legally infirmous.

Earth 544 [D. 305. Decided that a devise is not such a witness as the

12th Nov. 47. Stat. requires - clearly is as to his own devise. One who is no witness, cannot be a credible witness.

12th Nov. 47. (Interdict. vide Stat. 1253. The rule extends to inter-

dicted witnesses generally. If a good witness and other devises in the same instrument. If a bad witness and other

12th Nov. 47. rendered incompetent by crimes or persons legally infirmous, they cannot give evidence

93. - to their subscription. As where before attestation witness was convicted of larceny -

Why can a subscribing witness who is a devisee or (or creditor who has a charge on the land) otherwise interested at the time of attestation be rendered competent by any thing as post facto as by releasing to or his right under the will

Nov. 113. is established the devise? In other words, if the witness the instrument at the time of attestation is competent to testify at the time of examination, can the devise be established? is it well attested? Held abolished by Stat. 1253

Stat. 1253. in Annot. 44. Touring that the witnesses must be competent, at the time of attestation.

Devises

The witness wife had an annuity charged on
Lands not released - interest subsisting as in *Williams vs.*
Cov. 120. Jennings. This case was carried to the Exchequer Chamber
116. 503. There was a diff. of opinion & the case was compromised.

Cov. 124. The question was directly decided in favour of a
1 Brown 414. devise under such circumstances in *Wynodham vs. Gledwyrne*.
The witnesses were all creditors the debts charged on
the Lands - Paid before the time of examination. Devise
was Golden duly attested.
Hence the case was directly decided for the first time.

116. 503. 2 do 374. Same opinion manifested by *Lee Hardwick*
Cov. 120. in *Price vs. Lloyd*.

Cov. 135. 6. Case of *Lee Gledwyrne's* will in point to the
1 Day, 41. no. same purpose. Cited 1 Brown. 427. 5. The witnesses
all had legacies charged on the Lands by two wills
2. different to them - at Testator's death, not before
which was established - previous Vice -

Cov. 130. 2. 3. Same point decided in *Kindson vs. Kersey*.
Madworth vs. Camp decided in favour of the devise by *Lord C.*
reversed by *W. of Errors* - 1799.

3. The question is indeed whether the devise to the
1 Brown. 428. witness is not void ab initio so that he might
116. 503. 57. 8. *Conte vs. 54.* testify as to the other without a release. Not positively
116. 1253. settled - Decided contra in *Madworth vs. Camp*.

Stat. 25 Geo. 2. being declaratory in an authority in

Power 122. support of the opinion that the devise to a witness is ab-
 Stat. provides that initi^{to the witnesses} void & therefore that he is a competent witness
 creditors who are ^{to the witnesses} void & therefore that he is a competent witness
 subscribing mortgages that his declaratory vide Power 129. 133. 5 Bar 56. Prob
 and where debts are charge^{to the witnesses}
 in the land ^{to the witnesses} vide Power 133. 4. Some Stat. in N.York.
 competent witnesses with-
 at relinquishing their
 claims.

That the Stat provides that devise & legacies

to attesting witnesses shall be void & they admitted to
 testify & that creditors whose debts are charges on
 testator's lands & who are witnesses shall be admitted

Power 122-3.

as witnesses notwithstanding ~~the Stat. in~~

Stat. in Court, similar to the English except that if the devise is

Ld. R. of 30.

has at Law, the whole will is void. from 1 Jan. 1808.

Power 121. 134. by an interested witness restores him to competency

Mr. Powell has strongly
 misdeed the Act of 1801. Objection - Temptation to fraud at the time
 enactment, 25 Geo. 2. as sup-
 porting the opinion that at of attestation - what then - Some objection in every
 L. the witness was not
 competent. case at Com Law. Stat. of fraud intended to regulate

rules of evidence in Ct.

Objection - Parties furnish evidence. So in every
 case - Objection - Parties furnish evidence. They could not
 Judge of the execution - suppose same case at
 Com Law - Objection - Three Englishmen require -

1st Qualification is intelligible as referring to attestation
 but competent witnesses is not -

Power 135.

But a legatee or devisee is a good witness as to

Salk. 691.

He will - as to his interest -

Devises

25.
3/5.

According to the construction given to our Stat. all persons who before that Stat. could devise property which was devisable at Com. Law can Devise Lands &c under it — (all persons, & not otherwise legally incapable, &c.) See 9th. I know of no such rule —

Cor. 140-4. 1st. In certain parts of Eng. Wills may devise. By Perk. 224. Custom.

La. 11. 44. 686. 122. 142. Full age is completed on the day preceding P. 54. 1166. 589. the 21st anniversary of one's birth. vide Parent & Child.

114. 303. Cor. 146. 2nd. An Idiot is one who has no understanding from Dy. 143^{1/2}. 203^{1/2}. his nativity. — a natural Fool. Fiter. 233. 6.

A person is not an Idiot if he has any glimmering of reason as if he can tell his age — count &c. &c. —

Cor. 145. A person deaf dumb & blind cannot devise — Almon Co. Litt. 140.

~~114. 304.~~ An Idiot is wanting those senses which furnish the mind. The infirmities Ist. suppose are not superannuated with years, but from indolence or very early childhood. If dumb are not of with years, but from indolence or very early childhood.

Cor. 145. 5. 148. 6. 1131. 304. 3rd. A person of poor sense memory, ^{or mind is a misapprehension} tho' not an Idiot, cannot devise — By these words is meant insanity or mental is from nativity among the French are not wanting. In a lucid interval he may doubtless understand & arrange in gent — his devise.

Cor. 146. It is sufficient that Testator can remember common events Dy. 72. He must have what is called a disposing memory, i.e. under Moore, 760. standing suff^{ce} to make a reasonable disposition of his property. He must have the exercise of his reason.

Cor. 146. What is a sane & disposing memory is a question to 6 Co. 33^{1/2}. be determined by the rules of the com. Law —, it is, in other words, a question of Law; whether it exists in a given case is a question of fact.

Nov. 14. 6. 4.^A A feme covert cannot devise in Eng. her acc.
 1, Co. 51. Hob. 225. are supposed to be done by husband's coercion she want
 Co. Litt. 112. 8y. 30 & 34. free will — vide Baron & Feme. Expressly disabled
 Term. 18. by Stat. 34. 8. —

Nov. 14. 6. 5. And it has been holden that a custom for
 a feme covert to devise was not good — unreasonable —

Killing vs. Adams, Decided in Rom. that a feme covert may devise
 1786. 10p. 6. contn. real property even to her husband — For she may
 Killy 195. 498. at Rom Law devise what is devisable except so
 2 Day, 163. far as the husband's rights would be violated by the

1 W. 305. 418. 2 do. 75. disposition. Dec. 2 East. 55 n. ex. gr. property to her sole &
 1 W. 30. 12. 3 atk. 695. 709. separate use if not real. Imposed in 1809. by Statute
 R. 2. 24. 12. 126. 740. But under the Statute she cannot deprive her husband of
 2 do. 82. 316. the jointure. — Exception: she cannot bequeath personally without
 1 Per. 11. 502. the consent.
 2 W. 298. 891. — Husband's consent.

Pract. 60. This rule relates it seems to personal property belonging
 Dec. 2 East 55 & R. 2. 24. 126. to the husband by marriage: on which he has a right to control
 do 307. 4 do. 73. & 111. } "Because it would be a will of his goods" Cites Doctor
 express to this purpose — So of her pars rationabilis antiently. 1 W. 307.
 1 W. 307. 309. } So according to some, of her paraphernalia — Dec.
 5 W. 478. &

There seems then to be nothing in the condition
 of Custom to prevent a wife from devising what is devisable
 provided husband's rights are not infringed. Real property & her
 devisable & as for that does not arguably, femes covert they stand upon
 the same footing respecting it as with respect to property devisable
 at Rom Law —

Devises

25.
3/6

But even here she cannot deprive her husband of his Curtesy where he is entitled to it - (vide Judge Reeves's Essay) Decision of the Ct of Errors was affirmed by the Legislature on petition for new trial - decided contra Fitch vs Mainard 6th Dec. 1805

But if the husband is banished for life the wife may make a will (or devise I suppose) for then as a feme sole & may in all things act as such.

How. 48-9.
2 How. 104.
2 Bar. 49.

And in Eng. there are ways in which a feme covert may retain or procure the same power over her estate real as well as personal, as is possessed by feme sole, i.e. the power of aliening or devising -

How. 149.

How. 150. 2 L.R. 595. This may be done by either of two modes of settlement, 1st by way of trust; 2nd by way of power over a use. Such settlement may be made before or after marriage; if after however, it must be by fine or recovery -

How. 149.
How. 149.
How. 149.

And it seems that now a bare agreement for either of these purposes will be sufficient, tho' the settlement is not actually made: i.e. the Lien will be compelled in Equity to make a conveyance in pursuance of her appointment - Equity considers as done &c.

8 B. & C. 156.
2 Ke. 191.
Om. 168, 6.

1st By way of trust - as if a woman having real estate convey it before marriage or by fine or recovery afterwards to trustees in trust for herself to her separate

218.

Devises

use during coverture & afterwards in Trust for such persons as she shall by any writing or appoint- a devise by her will be a good declaration of the trust & supported in Equity - not called a Devise, but a writing in nature of a devise -

Ans. 162
2 Ks. 612

(2^d) By way of power over an use: As if a woman convey real estate, ut supra, to the use of herself for life

Ans. 150. 2 Ks. 695.

2 Ks. 614. 612.

3 Ans. 5. 8. 340.

4 Ks. 168. 300k. 707.

2 Ks. 614. 157. 400

753. 2. Ans. 695. 50.

2 Ks. 695. Ans. 162 - I now it is supported in Use of Law: i.e. devise

under a power of uses - not as I suppose in case of trusts supra - now are now legal estates.

Every power thus executed takes effect as if the limitation in the instrument of appointment had been contained in the original conveyance or deed creating the power. The disposition is considered as taking place when the power is created, tho the nomination of appointee does not take place, till the execution of the power. -

Ans. 163. 4. 8.

Co. L. 111. 12. -

Ans. 40. 9. 58. 150.

The deed of settlement ^{to uses or trusts} is considered as the deed of ^{application} limitation. The appointment by devise, in these cases, must be executed according to the Stat. of Frauds.

Devises

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Nov. 188-9. But if the feme covert is an infant she cannot
3 alk. 397. 26. 298.

Nov. 188-9. 437. Lo of Infants generally - Co. Litt. 52. 3 alk. 675. 710. 14-15 -
3. Pac. 138. n. wife Parent & Child -

112. 298. 304 - No infant can execute any discretionary power.

Nov. 170. Constraint, Duress & menaces of imprisonment
dy. 113. are disqualifications, - even at Com. Law; - not expressly
Co. 334. pointed out in Stat. 24 Hen. 8. tho. implied from the words
"at his free will & pleasure"

Nov. 136. I am not doubter in Com. for Freedom of will
5 Co. 119. which is essential to the making of every contract is
Nov. 163. wanting -

Nov. 170. To holden that if a sick man is induced by
Stat. 42. excessive importunity to make a will that he may
181. Rep. 68. obtain quiet, 'tis by restraint, & void.

Nov. 170. But there must be actual proof of undue importunity
1 alk. R. 125. or restraint -

The case ought to be clearer & stronger than I think the case is.
If either of the above disabilities exists at the
inception of the devise, i.e. its execution & publication,
it will be void tho. the disability be removed before

Nov. 172-3. its consummation by Testator's death - for the consummation
dy. 163. is founded on the inception which is void - ex. gr. Coverture
Nov. 246. Wood. 157. R. 34. Infancy &c. R. 343. - Lalk. 238.
1 alk. 182. Com. 54 -

A hint that cannot devise in Eng. This is the
rule as to devises by custom before Stat. Hen. 8. -

Proc. 174-5.
Litt. re. 287.
Co. Litt. 185.
Perk. re. 500.

For the survivor claims the whole by a title paramount - He claims by death of his companion the devise after the death - 'jeat & post' -

Count. 209. - and there cannot be a joint devise.

Proc. 12. 175-6.
218.

Same rule under Stat. Hen. 8. not expressly disqualified by these Stat. but tautly by 34 Hen. 8.

1 Reg. ca. ab. 172-8. which expressly empower persons seized in severalty apart & in Comm. - expresso animo &c

Proc. 176-8. 180. 176.

If a joint tenant makes a devise of his part & survives his companion & dies 'his part good'

3 Burr. 1488. 1788. 178.

3 Co. 31. formerly entitled.

Proc. 176. 1 Reg. ca. ab. 172.

Perk. re. 500.

void ab initio - He had nothing then to devise -

Perk. re. 500.

In Com. one joint tenant may devise, no survivorship - words of the Stat. jeat & post - And nothing in the Statute which would defeat excluded officers.
Gen. rule - a man cannot devise lands which he has not or is not seized ^{of which he} at the transcription of the devise, i.e. at the time of its execution & publication

Proc. 180-178.

2 Burr. 51. Co. Litt. 111.

Co. Litt. 401. Proc. 191.

Perk. 297. Holt, 246. 789. 500.

Ex. all lands of which I shall die possessed in the gift of 1797. 43.

the testator says - devise is in nature of conveyance for

admission of the natural in

present to take effect in futuro. The

man must have a present interest - Some

opinion contra - Livery dispensed with

from necessity -

Proc. 185-175.

This indeed is the Com. Law rule as applicable to lands & afterwards purchases more - latter does - devise is in nature of conveyance for admission of the natural in present to take effect in futuro. The man must have a present interest - Some opinion contra - Livery dispensed with from necessity -

Devises —

24^c
321.

Cur. 109. 16th. 575. *Secus* as to an after purchased lease for years
320. 109. 16th. 575. is only a chattel: for a will of personalty
~~in devises~~ is not considered, at com. Law, as a gift of a
independent reason, which
also in case of gift of property, *specific* thing but as the appointment of
an *Lev* — ~~owner~~ ^{or successor} to his personal estate.

In devises by custom 'tis necessary that
the devisor should die seized; for the conveyance
is not consummated till the Testator's death — *ex o*
Cur. 109. 16th. 575. 244. 390.
21th. 290. 1 Roll. 616.

Cur. 114. 6. If the owner of land after devising it, is disseised &
566. 611. continues to till his death, the devise is void —
Holt. 746

Secus if a disseisin by fraud & convi; good
Cur. 611. in Chan^y. —
1 Roll. 378.

1 Rep. ca. ab. 174. Same rule obtains under Stat. 27. Edw. 3. 15. 2.
196. 201. 2. 2 Bac. 52. 1 mod. 219. Holt. 251. 2. 243. (Mand. 344. 1599.

Holt. 748. 16th. 205. But if the owner being disseised after the devise
2 Bac. 52. re-enters & dies seized, the devise is good, for he
16th. 238. is considered as having been seized continually, —
Cur. 116. 5. 67.
11th. 17. 224.

So if the owner is disseised at the time of making
his devise, but afterwards enters & continues seized
till his death, the devise is good, for he is supposed
to have been seized ab initio. He is seized by relation —
Cur. 185. 5. act^y for merne profits.
2 Bac. 52. 16th. 238.

It has been much doubted whether a devise of
Lands, not owned at the time by the devisor, but
specifically described & afterwards purchased, is good —

Devises.

Am. 202. Pland. 344.

Holt 251. 3. 243.

L.R. 138. Lalk 237

3 Burr. 1486. 7 L.R. 466.

4 L.R. 496. 20.

Decided not to be - Contrary opinions -
Within the same reason as if not described -

Am. 202.

3 Bl. R. 97.

Upon the same principle a devise by mortgage
of the lands mortgaged will not pass the Equity
of Redemption, afterwards purchased by him -

In an. given by Devise is not necessary -
ownership is sufficient - "Having" or "seised" not used in Com. Stat.
Is in descent by com. Stat. right of power, equivalent for
most purposes to actual power -

3 Day, 1166.

And in Eng. a person having an equitable
estate in lands, i.e. a claimant to them in Equity
may in Equity devise the lands themselves. ex. gr.

Am. 203. 5-7. 2.

2 Bl. ca. 144. 9 mod.

71. Cr. 1402. 2 Wm. 77.

28 Wm. 831. 1 Wm. 494. 437.

Executory agreement. By A. to sell land to B. Before
conveyance to devisees then & dies, good in equity -
considered as done &c.

Am. 208.

Vendor is a trustee in Equity for vendee, &
on a bill by the latter the Ct. would decree a
specific performance -

Am. 212. 2.

20. Wm. 829.

This is not treated as a devise of a future
estate - the Land belongs to vendee from the agreement
in Equity - But the Land will not pass by a devise
executed before the executory agreement is made.

Am. 215. 2 Bl. ex.

141. 222. 20.

No present interest in Equity - *See* (18. 2. by
Ld. Chanc.) if the devise was for payment of debts -

Devises -

37.
323.

of things devisable under Stat. Hen. 8. & Stat. Con.

In Reg. no other than a fee simple estate is devisable,
Comm. 218.
229. under Stat. Hen. 8. The words "estate of inheritance" in 32 Hen. 8. being declared by Stat. to include estates in fee simple only.

The words of our Stat. being good "lands & other estates" include also estates per autre vie, as well as Reversionary interests are devisable at Com. Law. as 2 Inst. 7. Terms for years.

But 1st as to the subject matter, all Lands not devisable by custom are devisable under those Stat. - "all Lands" ^{of tenements} here denote the subject matter not the Land's estate - all estates are not devisable, but all Land's ^{tenements} are; i.e. if the Land has a devisable interest in them.

See Dir. 359. Tenements & hereditaments not valuable are
Comm. 227. not devisable under these Stat., as persons' franchises,
220. 41-5.
361. 32. ways &c. Words in Stat. Hen. 8. "of annual value"

Personal hereditaments ^{ways} are not devisable here I suppose - no estate in dross; they are ^{the} simple, are devisable.

2^d. See. 505. Bro. Vir. 805. 3 Co. 33. b. Bro. 226. easement only - words "lands & other estates."

Comm. 220. 6. Bro. 3. 309. Advowsons are devisable, being valuable.

10th. 619. But rents are devisable under Stat. Hen. 8. i.e. if the owner has a devisable interest in them.
3 Co. 33. 2.

An annuity in fee is also devisable - diff. from a fee.
See. 229. Stat. in this, that it is yearly sum charged on the person of the grantor.

Devils.

2^d What estate is devisable under Stat. Hen. 8 & Stat. con.
i.e. what interest deviser must have in the thing to be devised

Pow. 232. 7.
Hend. 557.
2 H. 107. 110.

There are several estates in Land, called estates in Fee simple - 1st Fee simple absolute. 2^d determinable. 3rd Base Fee; 4th Conditional. Since the Stat. de donis fees conditional are confined to person's hereditaments

Pow. 232. 7. 9.
1 H. 130. 142. 64.
3262.

ex. gr. an annuity descendible.

Pow. 232.
3 B. & L. 184.

All these are devisable by Stat. Hen. 8. - Fee simple is used in its most gen^d. sense, & is distinguished from estate tail. & per autem vice.

Fee estate in Fee simple may be in possession or not in possession: as to the former there has been no contrariety of opinion - ~~perhaps~~ oldm. devisable

Pow. 232. 4. 5.
Hend. 154.
1 H. B. L. 33.

Fee simple not in possession may be divided into, 1st Reversions. 2^d vested remainders - contingent remainders, executory devises & 4th Estates subject to a condition of reentry -

Pow. 232. 4.
3 B. & L. 184.
1 H. B. L. 33. 600.
1 H. B. L. 33. 1 H. B. L. 33.
See C. 281. 23. & 387. 405.

These interests are all devisable except the last - the formerly holders that the third class were void estates in possession

as to the devise of Reversions vide 1 Pow. 234.
10 Co. 78^a 2 Vern 621. 2 Kent. 285 -

10 Co. 81
Bolt. 312. -

a reversion expectant on an estate tail is devisable under these Stat. of Hen. 8. Pow. 235.

Devises.

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Don. 235. Holt 169. 2 Co. Litt. 111. To a Remainder expectant on an estate tail is devisable. Indeed this is a vested remainder. 2 Wood = 181-2. 184-5. 192. 204-30-1. Lalk. 232. 3 L.R. 488-9. n. vide Estate in possession

In Con. there can be neither Reversion nor Remainder expectant on an estate Tail -

Estate in fee simple may be legal & equitable both are devisable under Stat. of Hen. 8 & Con. e.g. an equity of Redemption - vide mortgages. So if an estate is granted

Don. 100. 2 Co. Litt. 978.

to A in trust for B & his heirs. B may devise it -

Don. 235-6 1 Co. Litt. 257.

Like uses before Stat. 27 Hen. 8.

3. What estates may be created by devise.

Estate in fee simple may devise an absolute fee simple;

Don. 237-8. so of course any other fee simple which can be created in the subject by act of the parties -

Don. 238-240.

3 Co. Litt. 218. So one having an absolute fee simple in possession Remainder or Reversion by devise may create a fee tail -

Holt 164

Don. 238-9.

10 Co. Litt. 97-8.

Don. 237-8. Lalk. 232.

But a devise of a fee simple after or upon a fee in not good: e.g. To A in fee, & if he die without heir to B in fee. This rule however relates to devises considered

Don. 238.

Don. 238.

as dispositions in present, not to executory devises - by these the rule is now evaded. But the case stated by way of example would be void by way of executory devise - contingency too remote - vide Estate in possession

Don. 248-249. as to Remainders created by devise & executory devises, vide supra -

Devises.

Pow. 240-1.

To Tenant in Fee may devise to one for his life or
per autre vie; devise may enter in these cases im-
 -mediately on devisors death -

Pow. 241.

The Reversion in these cases descends to the heirs
 of Devisor -

Pow. 241. Plowd. 35.

1 Geo. 2. 285. 2 Geo. 2. 29.

55. 84. 1 Geo. 1. 44.

To Tenant in Fee after having devised for
 life or in tail, may devise other estates out of the
 estate remaining in him; i.e. the Reversion, till his
 whole fee is exhausted - The latter to take effect upon
 the expiration of the former: ex. gr. To A. for life, then
 to B. in tail, then to C. in fee.

Pow. 242-3.

vide Estates in general.

And a Limitation of the ulterior estate remaining
 in the Devisor, at supra, may be either by way of
 Remainder, or by devise of the Reversion.

Pow. 243. 10 Co. 78.

Pow. 6. 243.

2 Bl. 374.

11

To a term for years in Lands may be created
 by devise: & de novo. Could a term for years be
 created out of Lands de novo and become Tenant?

Pow. 245-6

Eq. 126 & 348. 15

Estates created by devise may be absolute or
 conditional. ex. gr. To A. for life & then to B. for
 life - B. paying a certain rent to the heirs &c.

Pow. 246.

And these conditions may be precedent or
 subsequent. vide Estates in Condition -

Salk. 164.

There are no technical words to distinguish
 these two species of condition - every condition
 is to be construed as precedent or subsequent according

Devises.

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Can. 256 f. to the apparent intent of the Devisor.

But a condition describing the qualifications of devisee to take, is in its nature precedent: e.g. To it provided
Can. 247-8
2 Hen. 5th 340- If marry with the consent of Testator &cth marriage with this consent is a condition precedent.

But a devise to A & his L^{rs} upon condition that
Can. 218. within three months after Testator's death, he execute
W^{rit}. 420. a release of all demands to B in subsequent devise
24th. 165. of a present interest.

== Estates created by Devise may be either Legal or equitable - a devise of lands (i.e. where Devisor has
Can. 271. the legal estate) or of a use since Stat. of Uses 27 Hen. 8. is
2 Hen. 3th 208. a devise of a Legal estate. For the Stat. executes the use
23d. 27 Hen. 8. transfers the legal estate to it -

But a devise of a use before Stat. of Uses was
Can. 271 an equitable estate only - Is at this day is a devise of
a trust in Equity. Choff. is said to be holden in Trust
Can. 283. when the legal title is vested in one in trust for another.

Can. 271-8. - Uses were devisable at Com. Law before Stat. of Uses.

== If land is devised to one no use being limited upon it, it
Can. 271. cannot be converted to be the use of any other than the devisee
4 Co. 4. For this would be contrary to the intent upon the face of
the instrument.

Can. 271. 2 Hen. 3th 208. But if a use is limited it will enure to vesting give use &
Hume 107 1 Hen. 5th 33. will be executed by Stat. of Uses -

Devises.

Pow. 272. If Land is devised to A & his heirs to the use of it
 Reph. 4 for life only, the use of the fee is in Devisors heir —

— Pow. 282. (2^o) To an equitable estate may be devised thro' the
 medium of a trust. Reph. is said to be Lorden
 in Trust, when the legal estate is vested in one
 & to remain in him in trust for another

Pow. 285.
 2 M. 335-6. = Indeed such uses as are not executed by the
 Stat. are called trusts. 1 Eq. ca. at. 383. 5 mod. 63.

Pow. 285-7.
 2 M. 335-6. = as to the origin of trusts see 2 Bl. 375-6. Pow. 283-8.
 1 Eq. ca. 383. ^{line that uses}
 5 M. 2. Difference between a use & a trust: the former

Pow. 282. carries the legal estate, the latter does not —

For the distinction between trusts executed
 & executory vide Pow. 286-7. Atk. 581.

1st where the trustee are directed in the
 instrument creating the trust to execute a
 conveyance of the legal estate, it's executory —
 Pow. 286-7. 1 Atk. 581. 2^o where no further conveyance is directed,
 it's executed. But the executed trust does not
 include the legal estate — it's still an equitable
 interest — equitable trust.

a decree for the conveyance of the legal
 estate is as necessary in one case as in the
 other — Idem —

Pow. 287. 1 Atk. 581. ^{Dr Hardwicke says} that all trusts are in
 2 Ves. 323 — their nature executory —

Devise.

329

One may devise not only devisable interests, but an authority over such interests - e.g. Devise. Rest 23.

Yels. 13. Shall have the disposing, selling, letting, & ordering of Testator's Lands. Part a devise. However gives the Dev. 30th. devise only the power of managing the Land as he sees fit. 648. Pleases to have it at will, - not to sell or lease. 734. 341. For years, for he has no interest -

But if one devises that his Exe shall sell his.

Dev. 292. 3. Land or orders that his land shall be sold by them or Moore 774. appoints constitutes & empowers them to sell, they Co. Litt. 113. have a power 1 Roll. 331. m. authority to sell.

Devise "if my person's estate is insufficient, my land Comp. 43. to go to sell for payment of debts, all the residue La. R. 1324. 5. of my real estate to A." person is sufficient a trustee all the real immediately -

Authorities devised over Lands are of two kinds Dev. 292. 1st naked. - E. Coupled with an interest. - Comp. 263. 3. required.

2nd Coupled with an interest at Com Law before that of user 27 Hen 8. in Chaney. only - modification of user -

Dev. 291. 301. Co. Litt. 113. Rest. 330. 1st a naked authority is a bare power to sell & no Co. B. 382. Moore 774 under Co. Litt. interest devised, as in the last examples supra - 113. m. 2. 236. 181st m. 3. Comp. 456. 3 Part 583 -

Dev. 292. 344 In these cases the Fee held descends to the Heir till Co. Litt. 113. the sale. 3 Part 583. 1 Part 236. 236

Devises.

to the heir at Law.
 And a release of such authority by the person
 empowered is void - ex. gr. Ex. empowered to sell
 reverts to the heir, the release passes no interest
 for the Ex. has none -

But authority must be strictly pursued
 & the execution of the power must therefore be
 construed with reference to the power itself.
 power to sell does not enable to mortgage or mortgag.

The authority is strictly personal, not
 transmissible - person's confidence - If there
 are two & one dies the other cannot execute it
 So the latter are ex. for they take not as ex.

But as Trustees. vide Municipal Law -
 altered by Stat. N.Y. 1818, where one of the Ex. is refused, will by the other be good.
 Of course the power does not survive to the
 Ex. of the original Ex. in the last case. - If
 the devise is that his Lands shall be sold by his Ex.
 & surviving Ex. appoints Ex. & dies, they cannot sell
 for they are not Ex. to both the original Ex.

But a sale satisfying the words of the devise
 i.e. authority to sell it.
 will be good in this respect, ex. gr. One appoints
 these Ex. & devise his Lands to be sold by his Ex.
 & surviving Ex. a sale by the other two is good.

Devise will be good in this respect, ex. gr. One appoints
 these Ex. & devise his Lands to be sold by his Ex.
 & surviving Ex. a sale by the other two is good.
 If Testator devise that his Lands shall be
 sold without the person by whom an Ex. are the
 proper persons to sell.

Case 293-4.
 60. Litt. 1446.
 Auk's power cannot be
 delegated.

Case 294. 2 R. 241.
 2 R. 376. 1 R. 120.
 2 R. 287. 2 R. 244.
 1 R. 176.

Case 294-5. 1 R. 44.
 1 R. 145. 2 R. 177.
 1 R. 176.

Stat. N.Y.

Case 295-6.
 Moore, 61.

Case 296-7. 1 R. 146.
 Case 296-8. 2 R. 176.
 Case 296-9. 2 R. 341.
 Case 296-10. 2 R. 524.

Case 297-9. 2 R. 220. 2 R. 377.
 1 R. 301. 1 R. 450. 1 R. 451.
 1 R. 452. 1 R. 453. 1 R. 454.
 1 R. 455. 1 R. 456. 1 R. 457.
 1 R. 458. 1 R. 459. 1 R. 460.
 1 R. 461. 1 R. 462. 1 R. 463.
 1 R. 464. 1 R. 465. 1 R. 466.
 1 R. 467. 1 R. 468. 1 R. 469.
 1 R. 470. 1 R. 471. 1 R. 472.
 1 R. 473. 1 R. 474. 1 R. 475.
 1 R. 476. 1 R. 477. 1 R. 478.
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 1 R. 482. 1 R. 483. 1 R. 484.
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 1 R. 503. 1 R. 504. 1 R. 505.
 1 R. 506. 1 R. 507. 1 R. 508.
 1 R. 509. 1 R. 510. 1 R. 511.
 1 R. 512. 1 R. 513. 1 R. 514.
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 1 R. 569. 1 R. 570. 1 R. 571.
 1 R. 572. 1 R. 573. 1 R. 574.
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 1 R. 578. 1 R. 579. 1 R. 580.
 1 R. 581. 1 R. 582. 1 R. 583.
 1 R. 584. 1 R. 585. 1 R. 586.
 1 R. 587. 1 R. 588. 1 R. 589.
 1 R. 590. 1 R. 591. 1 R. 592.
 1 R. 593. 1 R. 594. 1 R. 595.
 1 R. 596. 1 R. 597. 1 R. 598.
 1 R. 599. 1 R. 600. 1 R. 601.
 1 R. 602. 1 R. 603. 1 R. 604.
 1 R. 605. 1 R. 606. 1 R. 607.
 1 R. 608. 1 R. 609. 1 R. 610.
 1 R. 611. 1 R. 612. 1 R. 613.
 1 R. 614. 1 R. 615. 1 R. 616.
 1 R. 617. 1 R. 618. 1 R. 619.
 1 R. 620. 1 R. 621. 1 R. 622.
 1 R. 623. 1 R. 624. 1 R. 625.
 1 R. 626. 1 R. 627. 1 R. 628.
 1 R. 629. 1 R. 630. 1 R. 631.
 1 R. 632. 1 R. 633. 1 R. 634.
 1 R. 635. 1 R. 636. 1 R. 637.
 1 R. 638. 1 R. 639. 1 R. 640.
 1 R. 641. 1 R. 642. 1 R. 643.
 1 R. 644. 1 R. 645. 1 R. 646.
 1 R. 647. 1 R. 648. 1 R. 649.
 1 R. 650. 1 R. 651. 1 R. 652.
 1 R. 653. 1 R. 654. 1 R. 655.
 1 R. 656. 1 R. 657. 1 R. 658.
 1 R. 659. 1 R. 660. 1 R. 661.
 1 R. 662. 1 R. 663. 1 R. 664.
 1 R. 665. 1 R. 666. 1 R. 667.
 1 R. 668. 1 R. 669. 1 R. 670.
 1 R. 671. 1 R. 672. 1 R. 673.
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 1 R. 704. 1 R. 705. 1 R. 706.
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 1 R. 995. 1 R. 996. 1 R. 997.
 1 R. 998. 1 R. 999. 1 R. 1000.

Devises.

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16th. 125.
 Pow. 299. But if the Dev. be no concern with the quality of
 1 Lev. 304. the sale, the heir is the person to sell, i.e. if the money
 Pow. 307. is not roots in the hands of the Ex.^r

(And in the last case but one the surviving Ex.^r
 they are to have the avails,

Pow. 298-9. may sell alone - for they take an Ex.^r virtute officii,
 307. 2 Lev. 226.
 6 Dy. 311/6. Upon the same principle, it seems, that the Ex.^r of the
 Toll. 114. Ex.^r might sell -

Toll. 127. 2 Vern. 544.
 Com. Dig. Admin. B. 7. If the person then empowered to sell
 Pow. 300. refuses to do it - those for whose benefit, the sale was
 intended may in Chancery compel him to sell -
 If the person appointed should die, Chancery, it seems,
 Pow. 303. would supply a trustee.

Pow. 301. 2-4. D. A Devise of Land or of any estate to Ex.^r or to Pl.
 1 Rest. 235-236.
 236. 18. 2. 3. to sell is a Devise of an authority coupled with an interest
 So if one devises the profits of Land to A, till his son

Pow. 301. 2. Leases 21, to educate him, the authority of A, is coupled with
 2do. 78. Dy. 21. an interest - Devise of the profits is a devise of the
 interest.
 In these cases the Devisee not the Heir has

Pow. 302. Pro. Ex. House R. estate till the expiration of the time limited;
 252. 404-285.
 281. 360. 78. 2. 3. if Devisee should die, his representatives will hold it
 112. 78. 112. 112. 112. during the term limited - devised in Com. as to rep^r
 2. Day, for to his estate during the term.

Devises.

Paw. 302. -
1 Ed. in 98.
Dy. 210. -

In the Estate of Devises will continue till the expiration
with the object of the devise to be sooner answered - ex. gr.
8th son, *supra*, should die before 21 - The rule is
otherwise as to making authorities - is merely incident to
the trust

17 B. 132. 2 trusts
10 W. 147. 10 W. 357.

Under a Limitation of an estate to such Child
children of it as to shall appoint - or of devise
appointment to one of its children is a good execution
of the power -

8 L. R. 118.
2 H. R. 136.
1 Atk. 558-9.
2 Br. 62. 297.

A power to appoint by Devise is not executed
by a mere residuary devise - ex. gr. A having a legal
estate in trust with a power to devise to either of his
sons, devises all his estates to his son B after payment
of his debts - the Trust estate does not pass -
No such intent - an appointment by will is no
execution of a power to appoint by deed -

8 L. R. 122.
Camp. 260

Who may take by Devise -

I hold. all persons not incapacitated by positive
Law may be devisees - under 32. Hen. 8. explained
by Stat. 34. Hen. 8. devise in mortmain are not
allowed, i. e. devise to corporations or bodies politic
Stat. 43. Hen. 8. authorized devise to corporations for
charitable uses but this exception is much
narrowed by Stat. 9. Geo. 2. -

Paw. 314. -
M. 479. 136. -
1 M. 268. -

Devises.

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2. Cor. Corporations not incapacitated to take by devise. Here then all Corporations which can purchase

& Hold Land, may be Devises —
But Corporations in Court, are generally restrained by their characters.
Devises may then be natural or civil persons

except in Eng. so far as the latter are disqualified by
the above Stat.

1st Natural persons Capable of taking by devise
may be either in esse, or not in esse. Those in
possession,
esse may be devised unless prevented by some civil
disqualification. Coverture is no disability. Husband,
indeed, may, at Law, defeat the devise, by disagreeing

to it, but Chancery will interpose to prevent him
from injuring the wife, ^{after his death}. Co wife may be devisee,

1 Roll. 610.
But 315-6. & the husband, tho. she cannot be grantee; for Devise

1 Reg. ex. al. 119-2.
Can take 112 ^{to} does not take effect, till his death — Holt, 241. —

an alien may take a devise, but he can hold
found by inquest of office that he is an alien.
2 Va. 380. 4 ^{lands} only till office found, the estate then reverts in the King —
9 Co. 141. 3 Pl. 258-9. Here I suppose in the Stat.

An illegitimate child cannot be a devisee till he
has acquired a name by reputation; but he may then
take by that name; ex. gr. Devise to son of A. not good
till A. has acquired the reputation of being father
in being a bastard —

Devises.

Nov. 319. 338. Co. Rec. 17. Devise to A. B. C. having acquired that name,
 3^d n. l. Dy. 313. Nov. 35. is good - Moore, 10. 6 Co. 65. 2 Roll 43. -
 Co. Rec. 14. 2^d Dy. 237.
 2 2^d. 149. 1st Dy. 410

Nov. 346-5. But if a devise is made to the children of A. B. C.
 Moore 10. Nov. 35. legitimate, will exclude his illegitimate children
 Nov. 345. Moore, 13. Laffoon said a devise by a mother of the Bastard -
 Co. Rec. 123^d. Dy. 345. no diff. it seems -

(2^d. as to natural persons not in esse, as children
in ventre sa mere, at the devisor's death - vis P. & Child

Nov. 320. 321. Distinctions formerly taken between a present devise
~~to an Inf.~~ 2 Pals. to an Inf. in ventre sa mere, & a devise by way
 245-6. Moore, 637. of Remainder - The latter was Holden good, if the
 Lalk. 228. - gift was, borne when the particular estate determined.
Devise, not - Reason the freehold would otherwise be in
 abeyance

2^d Dy. 149. 3^d Dy. 124. But now by Stat. 10 & 11. W. 3^d. if an estate is
 4 Co. 312. limited to one with a contingent remainder to his
 unborn child, a posthumous child shall take as if born
 in father's life time - See qn. whether this Stat. extends
 to devises & does not in form but it does in construction.
 Lalk. 228. If a distinction has been taken between a
~~devise to a person not in esse per verba de presenti,~~
~~to a person not in esse per verba de futuro.~~ In the latter case, it will
 settle that the person may take - ex. gr. to an
 unborn child when it shall be born

Nov. 322. People ab. 173. n. 2 Pals. 275.
 12 Co. 153. 1st Dy. 135. To a person not in esse per verba de futuro.
 Lalk. 229. In. 1095. In the latter case, it will
 3^d Dy. 124. settle that the person may take - ex. gr. to an
 Nov. 429. unborn child when it shall be born
 5th Dy. 50-1.

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Mar. 124. The latter is good by way of Ex. tory devise & the
 Nov. 326.
 Roll. 609. Freehold descends to the heir in the mean time.

The last distinction does not contemplate
 Remainder, but direct devises to Infants in continuation

590. 51. arguere. 1100. 243. So under a devise to such children as I shall
 R. 91. 50. 1100. 246. Lane living at his death; & posthumous child to take.
 2 Freeman. 228. 245. 399.

1100. 105. Learne 428. But whether a devise to an unborn child for use
 as present is good & living unborn at devisors death is not
 settled in Eng. according to Pow. 322. 332. Opinion, contrary
 Dy. 309. ⁶ more 63. 2. Pub. 273. 6. Salk 280. Ray. 83.
 ex. gr. "I devise to the ^{eldest son} ~~eldest son~~ of A. &c."

Bo P 243
 1100. 105. 244. 225.
 Pow. 330. 332. 124. The weight of opinion is in favour of the devisee
 Dwy. 476. 478. 479. 215.

The objection to the Infant taking is made a case.
 Pow. 924. i. that he has no capacity to take when the devise
 Pow. 124. takes effect, the freehold must be in abeyance till he
 is of age, if he takes at all.

But why does not the objection if it amounts to any
 2 mod. 9. Pow. 326. thing, hold in the case of an Ex. tory devise to such an
 1 Roll. 609. Infant which is clearly good - the freehold descends to the
 590. 51. 3. child. Heir in both cases till the Infant is born - the heir is
 526. 1100. 1100. not accountable for the immediate profits -

= 332. 3. At any rate if there are express words used & facts admitted to
 Pow. 332. 3. in the devise showing an inference that testator was aware
 1. 1100. 1100. 1100. of devisees incapacity to take immediately, he shall take by gift
 1. 1100. 1100. 1100. 1100. 1100. devise. ex. gr. to the unborn child of A. when he shall be born & devise to him
 2. 1100. 1100. 1100. 1100. 1100. Salk. 209. 30 - in law, &c.

Devises

11 Burn 2171. And according to the more modern & better opinion, every
 Pow. 320. 329. 336. ^{2d} devise to an unborn child does afford such an inference
 Lalk. 230. Peane because it implies a disposition to take effect at its
 428. 11 Wm. 105. birth - i.e. an executory or future disposition -
 2 Mod. 2. 9. 11 Wm. as to the devise to an infant in ventre sa mere with
 488. — a conditional limitation over & no child born alive

2 Eq. anal. 307.

Cant. 40. Comb. 437. — Moore 486. —

Pow. 336. —

Civil persons may be devisees as Ex.^{rs} & administrators
 ex. gr. Devise to the Ex.^r of B. is good — So civil persons

Pow. 336. f.

not in case, if the intent is clear — ex. gr. So the Ex.^r
 of J. P. Ex.^r —

Pow. 338.

But "parishioners" ^{or residents of the town} are not such civil persons as
 can take in that character — In. why?
 a devise to the corporation such a parish or town is good.

Every devise must be properly designated or
 A devise to such a church, meaning the communicants, is void if it is not
 incorporation. I cannot take — The designation may be either by

6 J. R. 671. Pow. 498.
 405. 407. 340. 337.

naming or describing him; & tho his name is
 mistaken still if he is sufficiently designated by
 description ^{applying to no other person.} he may take — not if the name

Rob. 32

Co. Litt. 3^a

applies to any other person — This requires to
 be taken with qualification — parol evidence may
 under certain restrictions be admitted to explain

Pow. 340. 11 R. 237.
 And Pow. 41. —

the ambiguity (of which post) ex. gr. to the Gov.
 of the State — So the Law of Merchant rule is applied —

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and the description. the not strictly applicable
 Pow. 338. may be made good by reputation - ex. gr. To A. the son
 10th. 410. of J. J. A being a bastard.

But this rule does not hold in favour of a bastard
 born after a devise made - for he must be capable of
 10. W. 529. taking if at all, at the time of his birth - but he
 Pow. 335-9. cannot gain the reputation of being the child of
 Co. Dig. 109. any one but by continuance of time - Preside.
 5th. 6 Co. 65. the birth of such a child is potentia remotionis -
 Co. Litt. 123b. in Potentia remotionis
 de Potentia in Extractione
 Extractione.

Pow. 339. Never also a devise to all the natural children
 Co. Litt. 530. of A will not enure to the benefit of one in ventu
ra mere -

A woman may take a devise under the offe
 Pow. 340. description of the wife of A, if she is reputed to
 & Co. 79^a. be his wife - tho. she is not his lawful wife -

So a devise may be constituted by an equivocal
 or inaccurate designation: ex. gr. under a devise signific
 Pow. 340. 496. puero of the devise, a daughter may take if such
 Dy. 337. - appears to have been the intent, tho prima facie the
 Moore 14-5. words designate a son - & a son would take
 Holt 32. under the description to the exclusion of an
 elder daughter -
~~Extractione~~

Devisee

Pow. 342.
 Co. Litt. 10th n.
 Polk. 11. 303.
 16th Co. 22. 4.
 vide M. R. 1002.

So a daughter may take under the description of
proximo sanguinis of the devisee, tho the adjection is
 masculine, as if there is no son. So the elder daughter
 in this case excludes the younger.

Pow. 344. 68th 7.
 Moore 220. 7.

The word Child or Children is a sufficient descrip-
 tion - of gr. So A for life & afterwards to his Children
 his children take a life estate in Remainder -
Descriptio personarum.

14th Co. 22. 4.
 Pow. 344. 68th 7.
 Co. Litt. 743.
 14th Co. 22. 4.
 4 T. R. 294.

The word Children is gently used as descriptive
 personarum or a word of description in which
 case the person described take a purchase
 ex gr. last case. So if an estate is devised
 to A & his children, & then living children
 & they take a joint estate as purchasers.

Pow. 505. Darg. 309. 10.
 When there is any doubt as to the designa-
 tion of the devisee the testator's intention
 is to be collected from the whole
 of things at the time of making the devise,
 King his will and not at the
 time of his death.

But if A, in the last case had at the time
 no child - children is a word of
 limitation, i.e. the children take as Heirs. They
 cannot take in Remainder as purchasers, because

Pow. 505. 6.
 Co. Litt. 743.
 Darg. 309. 10. 14th Co. 22. 4.
 14th Co. 22. 4. 31.
 4 T. R. 294.

There are no words of remainder, & they cannot
 take a present estate as purchasers, not in case
 since A takes an estate tail -

> # Pow. 345-6. - The description of a devisee may be gent or special

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By a genl. description is meant a designation of any persons who may happen to answer the description.

1st Ex. as if one devises to P. S. in tail, Remainder to the next heirs male of the devisor, - he who happens to be the next heir male is constituted devisee -

Dev. 346. To devisee may be constituted by a devise ~~to~~ such a stock, - family, or house, - & it will come to the heir principal of the house or family.

Dev. 347. If a devise is made to the posterity of A, his lineal heir if he has any shall take, if not, his collateral heir of the whole blood -

Dev. 347. If a devise is made to the next of the name
Dev. 347. of the Testator, next relation of his name whether male
Ex. 32. or female shall take

Dev. 347. Is a Devisee may be described by the words
Ex. 347. next of kin to devisor, in which case the person answering
Ex. 347. to that description by the rules for computing the
3 Ex. 347. under the Statute of distributions
degree of kindred will take -

1st legal computation relates to the testator's death.
And if a particular estate to another is interposed

4 Ex. 347. Still the words next of kin are construed to include those
3 Ex. 347. those only who answer the description, at the time
3 Ex. 347. of Testator's death -

Devises-

x

To the words "the nearest relations of my name" is a good description; but in this case relation is nomen collectivum & includes all Testator

Com. 347.4. 497.

1 Ver. 335-

nearest relations in the degree mentioned. ex. gr. all his brothers & sisters unmarried, if he has no nearer relations. - If Testator explains who

Com. 350. 373-4.

1 Ver. 32.

Com. 405-7.

he means by nearest relations, persons not falling within the description may take; ex. gr. to my nearest relation viz. "the Sister & Nephew", here the

latter tho not so near in kindred as the former shall take -

Com. 350-1.

1 Ver. 84.

3 Ver. 39-61.

If one devises to his nearest relative, "according to the Stat. of distributions," his wife ^{as wife} takes a part. For tho she would be entitled to a part ^{as wife} under the Stat. she is not ^{as wife} his relation, i.e. not related by consanguinity. -

=

Com. 357. 497. 8.

2 Ver. 32-9. 368.

1 Ver. 257.

1 Ver. 84.

If one, who bequeaths personal property then, to my nearest relations, those relations who would take under the Stat. of distributions are legatees - So I suppose if

the words were my relations -

Com. 352.

3 Ver. 278.

But if devises of land were thus described, viz. whether the above rule would hold, or the devise be void for uncertainty -

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In Gen. I presume the Stat. would ascertain the devisee in the last case; for that requires the succession as well to the real as to the personal estate of intestate.

Spone devise land to the next of kin name is a question whether a daughter who by marriage has changed her name can take: According to some this is the distinction, if she is unmarried both at the time of the devise & of testator's death she may take, tho married when the question arises. Less if she is married either at the time of the devise or devisor's death —

Gen. 252-3
Gen. Div. 576. 532.

But Ed. Hardwick seems to be of opinion that if the devise is immediate or by way of reversion remainder

Gen. 353
100. 338

his wife if she is unmarried at the time of the devise —
estate of inheritance limited upon a contingency, that her name at the time of the contingency's happening avoids her rights

Gen. 385. 12.
2 Gen. Com. 41.
2 Bl. 242. 160.
320. 5 Co. 30. 7 Co.
503. 8 Co. 16.
Hans. 25. 12.
4 Burr. 2179.
Doug. 323. 3 Co.
137. 12. 1125.
2 Co. 286. n.

This is a gen. rule of construction, founded on feudal principle, that if an estate of freehold is devised to one, with an immediate, or intermediate remainder, to his heirs, the "heirs of his body", or, ^{in case of devise,} "his issue" he takes an inheritance in the first case a fee simple in the two latter an estate tail. Rever. Doug. 2

1 Co. 99. Gresham's Case.
Doug. 323.
330-1.
2 Co. 246.
— 250.

Where the remainder is after an intermediate limitation —
Devisee takes an estate for life the inheritance in remainder joins not merges —

Devises

The words "Lien &c" are in such cases construed as words of limitation - not of description, i.e. to ascertain the quantity of interest given to the first devisee, & not to designate the persons who are to take after him - Reeves Essay. 1.

Where no previous freehold is limited to the ancestor - the word Lien is as apt a word of description as any other -

~~But~~ But as the reason of the rule has ceased with the abolition of feudal tenures, &c. endeavour as far as possible to narrow the rule - It almost always defeats the intention -

1 Co. ca. 26. 154.
Cov. Lin. 40.
Moore, 372. An Lien may therefore at this day take a Remainder: as a purchase under the description of Lien &c. tho a previous freehold is limited by the same devise to his ancestor, if it appears from

Revs. 358. - It seems that the word Lien &c. was intended as a description of person. ! Reeves Essay. 1. 4. q. To A. & Co. 17. 2. Lalk. 224.
Ld. R. 205. 4. Rev. 2579.

Revs. 358. Moore, 372. For life, Remainder: to him Lien for life only -

Revs. 359. Co. L. 40. 6 Co. 17. - To A. for life, & to his eldest issue male
A take for life only - If it has been limited to his eldest Lien

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Salk. 224.
Ow. 359.
Ld. R. 203.

to B, for life & to his issue male, & his heirs for ever - Here B. takes for life only & his issue male & Remains in fee -

How. 360.
H. 731.
1 Ro. 103.
Cus. Plin. 40.
4 T. R. 274.

Much in its most proper sense, description personae; but it has been generally construed as a word of limitation, except where the intention to use it in its proper sense has been manifest -

How. 363-4
1 Ro. 66.
Heam. 254
Reyn. 100,

If an estate is devised to A for life & after to the next heir male of his body & to the heirs male of his body, heir is a word of description; A takes for life only & his next heir male a remainder in fee purchase - Now the word next & the superadded words are negatory.

How. 365.

(2) a description of the devise may be special i.e. an actual description of a particular person not a designation (as in the above cases) of any person who may happen to answer the description ex. gr. I & the son of I. - Here the description designates not merely a son but a particular son of I.

Dyer 357.

How. 365. 1 Ro. ca. 24. 24. 24. 24.
H. 334. 24. 311.
2 Hen. 689

to the heir male of the body of A now living i.e. to the present heir apparent of A. 2 Hen. 689

How. 365-6.
2 Hen. 689.

to the second son of A This is a special description of the second son in the order of birth -

Devises.

Prov. 307.

Gen^l rule It is necessary that the devisee answer in all respects the description given him —

"

— do —

Hence if devise is described as Heir of male person, he must show that he is heir in that sense in which the word is used by Testator —

"

Prov. 387-8
Leak. 203. 12th 163.

Thus if one devise to the heir of B gently & B is attainted of felony, B's eldest son cannot take for B can have no heir —

Prov. 369

2 Lev. 70. Dy. 99^a 68
1 Co. 68. —

If one devise to the heir of B gently & dies B living, B's eldest son cannot take for "heirs not" *Laeser viventi* —

Prov. 370. 382. 385.

Leak. 34. 2 Roke 416. 5
Moore 260. Co. Litt 28^b

29^a 2 Wils. 1^a

If Testator describe any particular Heir, as the Heir female of B with more, the person to take must answer the description in both particulars, i.e. the must be Heir as well as a female: e.g. if B has a son his daughter cannot take —

Prov. 373. 463. 34

1 Vent. 372. 12 Roke 135.

P. Ct. 168. 447. 404-5.

But if the devise shows by positive words or necessary implication that a person not Heir gent^l was intended to take by the description of a particular Heir — such person will take, e.g. to my Heir, who is my brother A.B. Here A.B. will take, tho' not Heir gent^l

Prov. 376-8. 1 Roke 229.

1 Br. Ct. 487.

2 B. R. 1010.

If the intention is clear, not super, one may take under the description of Heir in the life time of his ancestor — as if Testator takes notice that the ancestor is living; e.g. to the Heir male of the Body of A. Begotten, giving

Dev. 398. 9. Nov. 18. But if one by Devise makes A ex of his lands.
 R. Ed. 1. 3. Feb. 44.

Will. 301 - I will take only his Chancel's seat.

After all, it's a gen^l rule that if the description

Dev. 348. 9. 122. is so far certain that the person intended may be

1 Hen. 3. 5. 10. 57th distinguished from every other person, the devise shall
 R. Ed. 1. 3. 523.

be clear 106. Nov. 92. not fail for mispelling ^{Adist} Missions: ex. gr. To Marguerit
 Dev. 405. 9. Dec. 293 the daughter of A. her name being Margary.
 1. 1. 30

To the wife B. B. dies his widow marie. 2. D.

Dev. 405. 6. then Executor dies; she shall take -
 1. 1. 30. 37. R. Ed. 1. 3. 44.

will in more constructive priority for uncertainty unless, the intention is unim-
 telligible. where a sick man devised to his posthumous

Dev. 406.

Should then in ventis so much & the child was born before

R. Ed. 1. 3. 5.

his death, it was adjudged to take under that description.

Dev. 407. 1. Dec. 193 But if the description is false & not merely defective
 the devise is good - ex. gr. to the heir of A. it being

Dev. 408. 2. Dec. 193. an alien - seen if the person claiming under the
 devise is reputed to be the heir of A.

Now a Devise may fail of taking effect

Dev. 409 a devise may be ineffectual either from defects
 apparent on the face of it or from something extrinsic
 of the first kind is any uncertainty or repugnancy
 in the words used as to the thing devised or the interest
 in it, or as to the gen^l interest of the decisor.

Dev. 407.

Such an uncertainty is termed a latent
 ambiguity -

Devises.

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Law. 409. To Limitations contrary to the policy of Law
fall under the defect apparent &

Buttine's objections to the validity of devises are
founded on some uncertainty or repugnancy arising
out of ~~the~~ facts not appearing on the face of the
instrument as where a doubt arises to whom of
several persons or to a list of several things, respect

Law. 409-10. tively answering the description used, the words
were intended to apply - uncertainty or repug-
nancy of this kind is called a latent ambiguity.
ex. "to A." when there are two of that name,
1st as to defects apparent on the face of the

devise or latent ambiguities - This is a universal
rule of construction that if there is in a devise an
uncertainty which cannot be explained, or a repug-

Law. 411. nancy which cannot be reconciled the devise is void.
So far as the uncertainty is as to the person or the thing
it shall beaspered - No part of the devise is void

Such uncertainty so apparent on the face of
the devise may be either as to the subject-matter
or thing devised or to the persons devised or

Law. 412. Devisee - 1st as to the subject-matter; ex. gr. I devise
a part of my lands to B. Devise of a mortgage on
house with the appurtenances &c. &c. no other

Devises

Mass. P. 53. Cas. C. 57. Land then is necessary to the enjoyment of the house
 Bro. Dir. 15. 113. 704.

2 T. 12. 498. 18. 11. 620. under it appears to be used in a more good sense

(2^d) as to the quantity of Interest: ex. gr. I devise
 my freehold to my wife for 5 years & if any of

Law 412-17. my three sons die before the 5 yrs. are out of the
 1 Bro. 692-754. 773 freehold then to be equally divided to what to
 2 Bro. 286. 289. Cas. C. 57

be divided? the freehold on the term of 5 yrs?

Parol evidence ^{to explain its intention} is not admitted - (post)

Jan. 418. 2 Km. 624-5. 3^d as to the person described as devisee is also

Q. 82. 1 Bro. 594 - absolutely uncertain; the devise is void. ex. gr. to the
 1 Bro. 51. Dec. 208 - best man in A - to one of the sons of B. L. Lanning
 Collier 482. several - to one of the poorest of my relations -

2 and 3 Bro. 172.

To my wife for life Remainder to the heirs male

Cas. 420. 1 Bro. 240

of any of my sons - no parol evidence admitted in
 any of these cases - (post)

Ex. P. 195 -

Cas. 422. 248-9. 1 Bro. 935 But a devise is never construed void for uncertainty
 10 Bro. 57th 2 Bro. 173/2 but from necessity, to be explained if possible -

10 Bro. 113. 1 Bro. 92.

(2^d) as to uncertainty arising from something dehors,
 or latent ambiguity - If from extrinsic facts

the person of the devisee is rendered absolutely un-

Cas. 324

5 Bro. 68th

- certain, the devise is void - ex. gr. "to my son"
 there being several. To B. of the three being
 that is if there is no
 two of the name. There
 proof stands to show
 who was intended.

Devises

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So if from extrinsic circumstances the above
 Par. 425. ~~lastly~~ ^{lastly} ~~implication~~ ^{implication} what land is meant
 ex. gr. my manor of B. he having two of that name
 Par. max. 100 But the devise were of one of my manors of B.
 Par. 425. devise might elect—

Par 425 & 20th. 374-5. How far parol evidence is admissible to
 3 T.R. 871. explain ambiguities of writ.

A devise may fail of effect for direct or
 Par. 426-32. ^{causes} ex. gr. because Testator intent is contrary to the
 1 Buls 63 2u. rule of Law—(Intention respect Par. 407) Ex. gr. he is
 as to the example. 3 T.R. 145-6. free 1/2 he die with Res. to B.

So if in the draught of the instrument Testator
 Par. 426 7. instructions are not followed. ex. gr. Testator directed
 Moore 356 a devise of Land to A for Life but the words carried ^{for}
 2u. read in toto: not good for Life for there was no devise
 for Life—

But if that which is agreeable to Testator intent
 can be separated from that which is contrary, the former
 Par. 427. is good; ex. gr. Testator directs an absolute Devise, ^{however}
 1 Leo. 113. annexes a condition, condition only is void— the
 devise is absolute

How 254-2 Par. 880. A Devise may fail because of operation of laws
 112 R. 187, 2 Co. 51. effect no more than the Law would effect with it—
 3 T.R. 523, 7. 2d. 233, 234. Ex. gr. 120. 107th 397. ex. gr. one devises land in fee to his son & dies son or not son

Devises,

Don. 497. 8. 8y. 12. 124. 334.

11th 9th 17. 24th. 57. Devise is idle & void, the son takes by descent -
 2nd 248. 10th. 545.

~~Don. 497. 8.~~

as to what act. will break the line of descent -
 vide Co. Litt. 12^b 15th. 93. 16th. 33^d. 17th. 141 -

Don. 497. 80-5

1st 12th 128

And the rule is gen^l. that if one devises to a person
 who is L. Lin. the same estate i.e. the same quantity
 of interest in the subject-matter as he would have
 taken by descent & not by purchase -

Don. 355. 430.

Don. 490-8

1st 12th 248.

Don. 378. 10th. 128.

The reason of the rule is 1st That the Lord may not
 be defrauded of the fruits of the tenure - 2^d That devisors
~~are~~ **may** not be defrauded of their debts - as they would
 have been before the Stat of Fraudulent Devises, 34th 11th 2nd Henry

2nd 12th 202.

Don. 495-6

3rd 12th 127.

These reasons have both ceased, but the rule is still
 of consequence in thing as affecting the course of descent
 from the devis - It is not important in either
 of the above considerations operate here - But suppose
 a person having two Lins A & B, devises half of his estate
 to A & his intestate as to the other half, will not the
 part which is considered as descending be first applied
 to the payment of debts - yes. but this does not seem
 to render the rule important here in the sense contemplated
 for the law is not within it - I would take
 the devise according to the distinction in Don. 499-441.

12th 234. Don. 82.

12th 128. 23. 12th 128.

3rd 12th 127.

If one devises to his Lin by way of Remainder
 it would descend to him as a Reversioner yet the case is
 within the general rule - for the estate is not altered

Devises

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Nov. 450-5-6. ex. gr. To my wife for life Remaind to Son. It being
 12th. 148. 12th. 148. devisors next heir - Devise is void -
 2d. 11. 3d. 118.

Nov. 482 To a devise of an estate for life only to Devisors
 3d. 11. 26. 118. Heir at Law - if no further disposition is made of
 the subject matter, for he takes all the interest which
 he would have taken if there had been no devise & the
 fee simple which descends merges the estate for life -

12th. 11. 28. Charging with a portion on an estate devised
 - Nov. 433-5. to the heir of Devisor, does not enable him to take by
 Nov. 433. 919. purchase, the quantity of interest is not altered, the
 more 644. 217. 150. Nov. 72. 118. 241. 11. 11. 103. 12. 122. profit is only incumbered

Nov. 436. 8. And it has been holden that if the charge on the Land
 Nov. 436. 11. 2. 118. is by way of condition, the heir to whom the devise
 286. 11. 11. 245. takes by purchase, ex. gr. to my eldest son & his heirs
 upon condition that he pay 10 or provided he pay 10
 Nov. 433-4-5. Nov. 72. 118. 218. But the weight of Authority is against the distinction -
 Nov. 433. 833. 919.

If then a devise is made which falls within the genl. rule, to
 Nov. 433-4. the heir who at devisors death happens to be a daughter
 286. 208. the birth of a posthumous son will divert her title -
 if she took by devise it would be otherwise

Nov. 439-1-4. The an alteration by Devise as to the time of the heirs
 11th. 118. 118. 224. receiving the estate does not enable him to take by purchase
 241. Nov. 72. the quantity of interest being the same, yet if the limitation

Nov. 439 to the heir by devise produces an alteration in the course of descent
 11th. 118. 118. 224. he takes by purchase, i.e. a devise ex. gr. one having 2 daughters who
 are his heirs devise to them, their heirs they take as devisees for
 the devise makes them joint tenants whereas if they take as heirs

Devises-

3 L.R. 127. S. 1
1 L.R. 112. 13.) They are coparceners - each having a distinct moiety

So if our Loving has daughters who are his heirs
Devise all his estate to one, she takes the whole by
L.R. 827. purchase, for if she took only half by the devise
Rex. 441. her sister would be coparcener with her of the
Co. Litt. 103. b. other half & the intent defeated.
Sack 242. Com. 120

And the devise may upon the gen^l principle
in question be good in part & void in part as to one
entire thing: ex. gr. Test in fee devise one half
Com. 442. of black acre to B his heir in fee, the other half
2 L.R. 830. to him in tail - void as to the former, good as to the latter

Lastly - a Devise may fail of effect by the death of
4 L.R. 604. Nov. 412. the devisee, Testator living: ex. gr. To A & his heirs
2 Wms. 720. Yr. 25. Supp 323. the devisee, living the Testator, A's heirs cannot take
10 W. 397. Inst. 423 R 406 a devisee living the Testator, A's heirs cannot take
1 Wms. 267. 2 Wms. 313. 2 this is the case even tho the devise is republished
Com. 676. R. 88. 439.

By a late Stat. of Leon. if devisee or Legatee living
child or grandchild of Testator dies before Testator &
no provision made of such contingency, the issue
of devisee shall take as he would have taken.

Waiver - a devise may also fail of effect
by devisee's waiving the benefit of it - The waiver
may be express or implied -
Nov. 442-3.

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The waiver is express when devisee actually refuses to accept the devise - *Don. 443.*

Don. 443 An implied waiver arises from some act of the devisee from which it is inferred that he does not accept -

Genl rule in Equity, that if a person having a claim upon part of what is devised independently of the devise & a claim to another part under the devise, asserts the former, he waives the latter - Implied waiver - ex. gr. Blackacre is settled on A for life, remainder to his com B

Don. 447-54

2 Vern. 581.

232-3.

Fallb. 176.

a devise Blackacre to a stranger & Whiteacre to B. If B insists on having Blackacre under the settlement, he cannot have Whiteacre under the devise

Don. 545-6.

153-4

Fallb. 176.

2 Ke. 14. 07.

This doctrine of implied waiver is founded on the idea of a tacit condition annexed to devise, that the devisee do not disturb the disposition that Statute has made -

And it is not necessary to give effect to the rule that the thing devised be of the same nature, or of equal value with that to which devisee has a claim independently of the devise -

Don. 150-3-4.

Fallb. 176

2 Ke. 14.

In such cases Equity will require devisee to make his election

Devises

But if Devisee is a Cr & not a mere volunteer
the rule does not apply: ex. gr. If one devise a part
of his estate for the payment of debts & devise to J. S.
another part to which a Cr has a higher title than
devisee, Cr may assert his title to the latter &
still claim his share of the assets devised to pay
debts - for the estate devised to J. S. is the less.

Per. 454-65-8.

20. Apr. 12.

2 Nov. 67.

1 Ves. 30

If Land to which I have a higher claim
than Testator is devised to B. by any instrument not
executed as to pay the Land & a Legacy to A. he

Per. 450. 1 Nov. 29.

307. —

may claim the Legacy & Land both - Here the tacit
condition does not apply, for Testator has not disposed
of the Land; as to that there is no Devise.

But still if there is an express clause in the
devise that a Legatee disputing the will shall forfeit
his legacy, his claiming the Land devised in the last
case will defeat his legacy, for there is an express
condition annexed to the legacy.

Per. 460-2

1 Nov. 12.

If Testator gives a Legacy to one in satisfaction
or instead of a particular thing expressed, that shall
not exclude him from another Benefit, the Legatee
claiming the latter is contrary to Testator's will - ex. gr.
Testator's wife is entitled under marriage agreement
to a portion in Lands & another in money

Devises

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315.

Can. 468.
Per. 30.
He gives her a legacy in satisfaction of the money
portion & devises the land to Ed. She may claim
both land & legacy -

And in all cases in order to oblige devisee to stand
at once, it must be clearly evinced that the devisee's
taking both interests will defeat the genl interest
of the deviser - ex. gr. Testator leaving devised stock
due to his wife, immediately, devise to her Whiteacre
by way of Remainder, this does not prevent her
from claiming Dower in Whiteacre. To a wife may
claim her marriage settlement tho not devised to her
by a residuary legacy -

Can. 466-9.
3 Ark. 430.
2 Penn 385.
La. R. 438.
1 Ke. 230.
2 Ky. ca. 26. 391.
8 Penn. 244.

A devise may fail of effect by Testator performing
in his life time what it was the object of the devise to
accomplish - ex. gr. Testator devised £400 to complete
a building & afterwards, before his death expended
more than that sum on the house - his heir shall
not have the benefit of the devise -

Can. 140-1.
1 Penn. 95.

To a devise may fail of effect in consequence
of Acts 31 & 41 M^o & Henry 8th as fraudulent devises. Under
this Stat all devises of land are void as of devises. Land
or i.e. the Co are entitled to satisfaction out of the
land, if the asset fail - Heir & devisee tied jointly -

Can. 471-4
2 M^o. 378.
3 Penn. 37.
3 Ark. 536
2 Mo. 125.
16 M^o. 124.

Can. 473.
2 M^o. 378.
3 Ark. 274.
Before the Stat Devises selling & aliening before act
lost - say. Can. Held to the exclusion - of H^os
Lopham no alienation -

Devises

Par. 473. 20th. 205. This Stat. is literally construed.

The gen^l Law relating to the Settlement of deceased persons estates in Con. gives Pre^l of preference to Devises.

Par. 474-5.
20th. 435
3 Co. 12^b

This Eng. Stat. affects the relative rights of Co^l & devisees only - It does not relate to those of Heir & Devisee ex Co^l Lands descended are liable to Co^l before Lands Devisee Devisee a purchaser.

How far parol evidence may be admitted to
controul or explain a devise

Every instrument consists of matter of fact & matter of Law - The former may be averred & proved on an issue in fact: e.g. Whether the instrument was executed
Par. 474. S Co. 155. whether after execution it was altered &c

But matter of Law is not the subject of an averment, not triable by a Jury, neq^l not
Par. 477. 8 Co. 145. proceable as a fact. e.g. Devise to A & his Heir What estate A takes is a question of Law to be
Par. 487-8. determined as a matter of legal construction

an uncertainty. The former kind is a latent ambiguity, of the latter a patent - Hence it is a gen^l rule that Testators declarations cannot be given in evidence to controul the operation of the words used in his Devise or to give them

Devises.

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Dev. 477. 8. an import which upon the face of them they
502. 478. will not bear - This rule has obtained ever since
Nov. 345. devise, were required to be written & before the
560. 68. 2. 1790 test. of fraud, &c. - It holds as well in wills of
136. 7. 41. 1763. personal property as of real property
2 do 27. 3 mod. 978.

Nov. 478. 680. 67. Testator's declaration may apply to the devise
 or to the person of the devisee. In both cases inadmissible
 when they relate to matter of Law, viz; to matter of construc-
 tion upon the face of the instrument -

1st As to the import of the devise itself; e.g. Devise to
Nov. 478. 878. A & the heirs of his body, Remainder to B & the heirs male of
5 Bo. 68. 2. 1790. his body, on condition that he or they should not alienate
Nov. 500. 2. 1790.

247. Oral evidence not admitted to prove who were meant
 by "he or they". matter of legal construction - upon
 the face of the devise -

Nov. 400. 4 Bo. 4-5. So if one devises to his wife for life &c. &c., paid
La. R. 158. evidence not admissible to prove that it was intended
1 Bp. ca. ab. 219. to him instead of her

So when a devise was on condition, oral evidence
Nov. 480. 4 Bo. 4-5. by testator were not admitted to prove that the events
La. R. 232. which had happened were intended by him to amount
2 Nov. 333. to a breach of the condition - So when one leaving
Nov. 183

Nov. 138 covenanted to sell his estate to his son in Law for £1000 less than
 it was worth, devised £1400 to the son in Law and was not
 admitted to prove that the legacy was in satisfaction of
 the covenant -

not ante
2.

Par. 484. 20th Mar. 21st
1st Ver. 187. 2nd Ver. 218
3rd Ver. 218
To or a Devise to Testator. & another parol evidence
of his intention that the land should be subject to her
Husband's debts was excluded.

2nd Ver. 218
As to the person of the devisee Testator's declaration
is not admissible as to matters of construction a Law
e.g. devise to A who died, Testator living, evidence
not admitted to prove Testator's declaration that B
A's son should have what A would have taken if
he had lived - Hence no ambiguity patent or latent

Par. 485 Par. 365 Attempt to contradict the devise - Par. 485

2nd Ver. 70
Par. 486.
Par. 48. 54
To Devise to the heirs of the body of A & if he die
with issue, to B Testator die, A living. His issue
therefore cannot take & parol evidence of Testator's
intention to give to A's children even during ^{his} life
not admissible: For whether or not his issue can take
he living, is a question of construction on the face
of the devise -

Par. 489
Par. 500.
2nd Ver. 216 1st Ver.
To where Testator having mentioned two
women, devised to "her" parol evidence not admitted
to show which of the two was meant

Par. 6
Par. 187 2nd Ver. 218
2nd Ver. 218. 2nd Ver. 218.
But as to what are called matters of fact, i.e. as to
latent ambiguities, the rule is that parol evidence
is admissible to explain them, if the matter asserted
stands with words of the devise -

Pow. 487. 8. Rule the same as to com. Less conveyance: but not
423. 495. 512. to contradict the words - Talk. 240. Pow. 521. -
2 Ves. 216 -

Thus, if one devise or grant to his son A, his
Pow. 468. 9. Having two sons of that name, parol evidence is admissible
5 Co. 58. 2 to show that the younger son was intended. The evidence
2 R. 112. 137. stands with the words - Latent ambiguity; ex. gr.
1 Ves. 231. 8 Co. 55.

6 R. 671. That Testator supposed the son to be dead, his declaration
10. 110. 674. can be proved it seems - Pow. 496-7-5. 2 Ves. 216.

10 R. 674. 2 Co. 107. 2 Co. 107. 2 Co. 107. 2 Co. 107. 2 Co. 107.
1 Ves. 231. - So if a devise were to Ed. of D. then living two - Pow. 490. 671.

Pow. 488-90. 8 Co. 55. To devise to A of the manor of Delere Laving two
of the same name
11 R. 272. parol evidence admissible to show which was meant -
stands well in -

Pow. 490. 10. To parol evidence has been admitted to prove
3 Kel. 310. whether an instrument was intended to be a deed or a
1 Mod. 117. devise. ex. gr. that direction, were given to make a will.

Pow. 492. Talk. 7. So if a devise is made to A then living rather
6 Mod. 117. than of that name, evidence is admissible to prove that
12 R. 411. Testator did not know the father
20 R. 110. 106.

1 Jno. 33. 21. If devise is wrongly named still if sufficiently
11 Co. 21. described, it may be proved by parol to be the person
1 Green 299. intended. Pow. 337. 340. 405-7-99-8. 10. 21. 3. 10. 197.

Not so it is said in Deeds. Pow. 498. Pow. 498. Pow. 498. 107
2 Ves. 11. 21. But it is so not withstanding

Devises

One 494-5. 521. 5. To a Devise to A's four Children, L. Having
 2 Nov. 216. — Lx, 2 by B & 4 by C - parol evidence good to show
 that the four ^{wife} by C. were meant. Test had deat. prove

But a devise to one of the sons of A & L. Having
 several is void - parol evidence inadmissible - pretend -
 ambiguity - matter of legal construction. One 488-90.

If the name given to devise applies exclusively
 to one person & the description exclusively to another
 it may be proved by parol that the wrong name was
 inserted by mistake, it seems - Can any other
 people admitted in such a case?

To where Testator gave a legatee a name which
 the name bore, parol evidence allowed to prove that
 Testator knew such a person & used to call him by a
nickname.

To where a devise was to the poor of A in
 the County of B & A was not in that County
 parol was admitted to ascertain the parish.

But if the person wrongly named is not at all
 described, no evidence admitted to show who was intended
 ex. gr. mine for new - The evidence I suppose
 would not stand with the words. Ex. could it not
 be proved that the insertion was by mistake?

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If words of equivocal import are used, parol evidence is admitted to direct the application of them. This is done not so much for the purpose of furnishing a construction, i.e. an explanation of the effect & operation of words, understood as an interpretation, i.e. an explanation of terms not certainly understood - however some of the cases go farther - (Hook) ex gr. devise.

Ex. 287. uniori in evidence is admitted to show that Moore 1045. The eldest child was meant so that a Daughter Holt 32. might take, Pow. 340. 496.

So when a devise is to Testators nearest relations parol evidence is admitted to show that he knew certain persons answering that description, but no further - His declaration not provable -

Pow. 497.8
1 Ves. 291.

But in these cases evidence is never admitted to give words a sense which they will not bear on the face of the instrument. ex. gr. the word son is sometimes construed to mean a grandson but not if there is a son living. In. 608-9.

Pow. 507.8. 577 But if it appear from the devise that the word was intended to apply to a son only, no parol evidence admitted to show that the word was meant to apply to a grandson; this would contravert the legal construction -
mod. 316. 1 Kent 240.
20 438. 2 Lev. 263.
2 How. 63. 106-7.
As if the legacy in same instrument be assigned son
Pow. 67. 8. 29.

Par. 501-2. 523
2 Btk. 240.
8 Nov. 195
2 Rep. ca. ab. 415. s. of W. - to a Charity "evidence not admitted to them
whose name was intended to fill the blank.

Par. 523.
8 Nov. 195.
2 Rep. ca. ab. 415.
To whom Testator gave directions to have all his
personal estate given to his Ex^{ts} & it was omitted by mis-
take, evidence of the mistake not admitted -

Acts of Law & Equity have also permitted proof of facts
extrinsic, to explain words of equivocal import as
to the quantity of interest devised, i.e. where proof
stands with the words.

1st Proof of Testator's Circumstances has been
(admitted to ascertain the quantity of Interest, the
import of the terms being equivocal. e.g. devise
of Testator's whole estate to J. T. & paying Testator's
debts &c. evidence admitted to show this personal
estate was intended, to pay them & that therefore a
free must pass, that devisee might sell.

1 T.R. 412. 2 do 657.
4 do 93. 5 do 502. 6 do 388.
8 do 67. 502. 2 Bk. 50.
And settled that "estate" carries a fee, unless
restrained by other words.

To whom the question was upon equivocal words
whether a legatee of Testator's personal estate
took it absolutely or for life only, the being

Devises

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Testator's wife evidence admitted to show that it was insufficient to support her unless she used the principal or stock -

2^d Proof has been admitted for same purpose as to the value of the property devised - e.g. Devise of all Testator's

to A & L paying to B £100 in a year out of the profits of the Land - proof admitted that this sum exceeds the annual profits of the Land to show that a fee was intended -

Now regularly a devise charged with the payment of a gross sum carries a fee of course - & such evidence is unnecessary

3^d Proof admitted as to condition of Testator's family

to ascertain the application of a term which may be a word either of purchase or of limitation, e.g.

devised to A & his children or his issues - Proof

admitted as to the fact of his having children or not at the time of the devise - If not in estate tail, i.e. creates -

1st Evidence (admitted as to the state of Testator's property to ascertain the meaning of words used in themselves equivocal - but which when considered with reference to the state of his property will bear & require a construction different from that which they prima facie import e.g. I devise the house called bell tower to A, proof admitted that A was tenant in tail of the house & that devise

Ans. 508-9. Talk 236. Had only the Reversion in order to show that an
 R. 831. Kohn. 744. estate in fee was intended.
 1 Br. C. C. 108.

So in *Donnan vs Pointing* (1 Br. Ch. 472)
 Par. 519. n. evidence admitted to create an ambiguity where
 there was none on the face of the instrument

Here the proof stands with the words, tho not
 with the meaning which they prima facie convey.

But no amendment which does not stand well
 with the words can be admitted. Thus where one
 devised to the children of A, he having 6. evidence
 not admitted to show that four only were intended.

So when Testator devised the residue of his
 estate to his Ex^{ts} one of them being indebted to him
 Cox 522-3. - I gave evidence not admitted to show that his intention
 Talk 240. - was to forgive the debt, for the residuary clause
 Rev. 1201. - included in it -
 2 Green 52.

So when the residuum of Testator prop^y
 was not disposed of, evidence not admitted to show
 Ans. 524 that Testator's intention was that his Ex^{ts} should
 not have it.

But parol evidence even of Testator's declaration
 is admitted to rebut an equity & not an
 implication not to establish it -

Devises

73
365-

an Equity means a just an equitable claim
But the meaning of the rule as here applied to
the case of a devise is this; - that where from the
face of the devise equity raises an inference which
is contrary to the legal conclusion arising from it

Par. 524 Parol evidence is admissible to rebut or controvert
the former, which is in effect to establish the latter
e.g. If land is devised to an Ex^t for payment of
debts, the surplus belongs at Law to the Ex^t. In

Equity there is a resulting trust as to the surplus, to
the heir; i.e. Ex^t is trustee of it for the heir. In
Par. 524-8

18 Bl. ca. 76. This case evidence is admitted even if Testator declar-
ed 2 Keen 252. 577.

Tell. 77. 240. Nations to show - that Ex^t was intended to have the
L.R. 1324

1 Ke. 323. 26 p. ca Surplus -
also 585-1 -

So where Ex^t bequeathed £200 a piece to 40 B
& afterwards by a codicil directed the Ex^t to pay them
2 Keen 252. 577. £200, evidence was admitted to show that 4000 were
were intended to be given -

So where Testator gave considerable legacies
to his Ex^t from which the inference in Equity
was that he was not to have the ~~acknowledgment~~ -
evidence admitted of Testator's declarations that Ex^t should have it -

Par. 527-8
2 Keen 577.
Tell. 77.

Devises

and upon the ground that the evidence offered does not contradict the will, prob. proof has been admitted to show that a devise was intended as a performance of a previous agreement - e.g. agreement by marriage article to settle £100 th annuum on the wife, husband devises to her £100 th annuum. evidence permitted that the above devise was intended as a performance of the agreement

Pow. 529. 4
Wes. 823 -

Prob. evidence admitted in all cases to counteract fraud; e.g. one devised his real estate to an Ex^t & omitted to charge the estate with an annuity devised to A, because Ex^t promised to pay it; evidence admissible

Pow. 530-1.
2 Vern. 556.

of Revocations. - Will & Devise

Pow. 550. ambulatory until Testator's death, i.e. not Consummated, i.e. not, e.g., revocable by Testator.

Revocations may be considered under two gen^l views - 1st as they stand at Common Law, i.e. before Stat. Frauds & 2^d as they stand under that Stat.

Devises —

45
367-

Can. 532.

1st of Revocations at Con. Law —

These are of two kinds — express & implied —

do —

1st Express revocations at Con. Law might be by writing or parol — 1st by writing; as by codicil or subsequent will expressly revoking the former —

do. 532. 533

2^d By parol; as if one Leving made a devise

by 310. Wills. expressly revoke "I revoke my will" or to that amount. Exo. 2. 115. 497.

But in this case it must be clear that the words were spoken animo revocandi, ergo alio test.

2^d because Leving did not visit him, he should not

Can. 533.

Geo. 2. 155.

Can. 6. 51.

600 651

Have his land, but making no express reference to his devise — devise not revoked —

Can. 306.

1. None, 187.

Can. 533.

Can. 2. 147.

2. Part 418.

495 —

To words importing an intention to revoke in future, do not work a revocation at Con. Law; ex. gr. my will shall not stand, or I will alter it — Same rule holds since the Stat. of a similar intent expressed in writing, &c. it seems —

Can. 532.

532-5.

1. Side fin

75

2^d Revocations at Con. Law, maybe implied — an implied revocation is by some declaration or act given nothing ground to presume that Testator intent to devise must be changed — Here the revocation is implied on a revocation in Law — as if Testator having devised to a stranger, says animo revocandi

QUESTIONS

Com. 535. 1 Ed. 73

Wille 253.

my son shall be my heir

Com. 535. 254

'Acts' of Devisor amounting to a revocation in law may be by writing or in fact -

1st By writing. as if one having made a devise afterwards make another inconsistent with, but not expressly revoking it - tis a revocation in Law: et. gr. One devise his land to A & by a subsequent will to B or he first devises all his estate to two & afterwards to one of them -

Com. 535. 6

3 Wille. 511-12

3 mod 216

Com. 535. 6

3 Wille. 511-12

3 mod 216

Said however that if one devise Land to A & in a subsequent part of the same instrument devise the same Land to B, A & B take jointly - not as to a specific legacy ^{as a horse} ^{different} ^{it seems} - that the latter revokes.

9 216. 375-

12-30

But a subsequent devise not containing express words of revocation does not revoke a former one unless inconsistent with it; says the mere fact that a later devise exists, tho found by a Jury, will not warrant the Ct in deciding that a former is revoked by it. For the second may relate to a diff^t subject matter, or it may confirm the former -

1 Wille 112

Com. 534. 541

Quod 374. Pro.

3 B. 146. 3 mod. 203.

Com. 534. 541

3 Wille. 517. 2 B. 12. 237

3 B. 12. 237

Com. 534. 541

3 B. 12. 237

And tho tis expressly found that the second is diff^t from the first yet if it is not ascertained

Prov. 530-541. in what the difference consists the first is not
3 Inst. 497. 2 B.R.
937. Comp 87. revoked - causa qua sententia - 2 Inst 408-

Prov. 540-4
But if it were found that the second devise
was inconsistent with the disposition made in the
first, the second would be a revocation. I mean

to a codicil inconsistent with the preceding devise
to which it is annexed, works a revocation; e.g. Devise
Prov. 471-2 of Blackacre to A, by a subsequent codicil giving
3 Inst. 552. of Blackacre to A, by a subsequent codicil giving
11es. 32. whiteracre to A, Blackacre is given to B-

But a distinction is taken between the revoking
effect & that of a subsequent will in this viz, that a
Prov. 545-46 codicil being part of the will & not in its own nature
Swink. 15. intended as an instrument of revocation, does not
revoke except precisely in the degree expressed -
e.g. devise of lands to three trustees to a charitable
Prov. 546-5 use, by a codicil the devised are the same trust to
11es. 174-186 give, i.e. to the same three & two more the trust is
1. Inst. 449 not revoked -

Whereas the 1st by Counsel a subsequent will a devise
Prov. 547 varying such disposition made in a former one & a
11es. 187. total revocation. For in such this proportion
is

too general - Note the case where one devised lands
Prov. 13-4. in fee to his son & by a subsequent devise gave the same
Cous. 701. 11es. 187. to his wife for life - Comp. 87 Prov. 507. 11es. 624.
307-315

Devises-

If one makes a second devise inconsistent with a former one under a false impression as to a matter of fact, which furnishes the motive to make the second; & the supposed fact after his death is found not to exist - the first is not revoked - e.g. one devises land to A & afterwards by another instrument reciting that A is dead, devises the land to B, if A is alive, B will take. This is a rule of the Roman law & common law.

Don. 546?

Don. 546?

But according to Don. a false impression will not avoid the second devise, unless it is the consequence of deceit practiced upon the Testator. Don. No actual deceit; i.e. wilful misrepresentation is supposed in his own examples. He seems from his examples to mean from deceit, nothing more than misinformation as to matter of fact: For the case which he distinguishes from the case of deceit is one where the misapprehension is as to matter of law only - viz. it being doubtful whether according to the rules of Law or Equity, I may devise my estate to the legatee or not. He therefore says; 2^d in this case Don. suppose the second devise good -

Don. 547

If a former devise is revoked by a subsequent one on the principle that the latter is inconsistent with the principles of the former the implied revocation as well as the instrument containing it

Devises -

371-²⁴77

Over 549. is ambulatory till Testator's death - viz the latter being
4 Burr 2512. revoked, the former stands. -
Perk. H. 579.

But it seems that if the second devise expressly

Over 549. & 551. & 552. revoke the first a revocation of the second does not
Comp. 53. reestablish the first if it remains in existence -
Gray. 40

Because the revocation is express, an independent
Comp. 99. substantive act by which the former becomes imme-
4 Burr 2512. diately void - Per.

Over 556. 552 Secondly - acts amounting to an implied revocation
535 - may be by matter in fact.

Over 556. As first by a total alteration in the relative
565. circumstances. A devise, secondly by an actual or
intended alteration in the estate devised -

First, no alteration in the devisors circumstances except
Gray. 35. that of marriage & the birth of a child has as yet been
Perk. 243. decided to be a revocation of a devise previously made
1 Per. 191. (the devise being a male) But not an alteration of
1 Per. 376. circumstances is a revocation. Reg. ca. ad. 413. Perk 552
2 L.R. 441. (the devise being a male) But not an alteration of
1 L.R. 304. circumstances is a revocation. Reg. ca. ad. 413. Perk 552
Over 554. 2d. under special circumstances 5 Per. 553. So that the
4 Burr 217-82. child born is posthumous. 5 L.R. 49.

A subsequent marriage only or the subsequent
birth of a child only not suff. (it seems even when)
to revoke a man's devise - But in England that
the subsequent birth of a child alone is a revocation
if no provision is made in the devise for such contingencies

Cas. 559-7-6

Quap. 31.

Day. 31-5
Par. 556-9.
1 Rep. ca. ab. 419.
1 L.R. 441. Qu.
5 Rep. 648. 664

Par. 556-7.
Rep. ca. ab. 419.

5 T.R. 58-9.

2 Bait 541-2

The reason of the rule is said to be that from such a change of circumstances the Testator is presumed to have changed his intention as to the disposition of his property - Hence any evidence written or oral is admitted to prove that Testator has not altered his intention, i.e. to rebut the presumption - as, e.g. the presumption itself is raised by oral or may be rebutted by his own declarations - vide 2 N.H. 582. 2 Bait 584-43-44

To whom Testator devised his real estate in fee to the person whom he afterwards married & gave only a legacy to his brother - such a change holdsen not to be revocation - But qu. whether this is the true reason; for in the case of a subsequent marriage & birth of a child (posthumous) the devise is revoked it seems - tho the conception was ^{not} known to the Testator - & I conceive if he knew of the conception at the time of his death & an abortion should afterwards happen, there would be no revocation - yet his intention could not be influenced by the fact in the former - but in the latter it might be - And what legal effect can a mere intent to revoke have if there is no actual revocation?

What then is the principle? according to Lord Kenyon there is a tacit condition

Devises

373-7

annexed to every devise at the time of making it
that the Testator does not then intend that it shall
570. 58. 59. take effect if such a total change should happen in

his situation. This principle is approved by Lord
2 East 541. 2 Ellenborough. This idea at any rate reconciles the authorities.

Per 440

Per 560-6-7.

2 East 541. 2

But there has been no case yet decided in which
marriage & have been holden to be a revocation
except where the disposition has been of Testator's whole estate

Per

Per 566-7-60.

1 Bg. Ca. 26. 413.

Long. 38th 10.

And it seems that if Testator subsequent wife &
children are duly provided for, either by the devise itself
or by his dying intestate in part, the presumption
of a change of intention does not arise from the marriage
in the tacit condition is not annexed.

2 East 53rd

2 East 500.

Bar. 39.

and marriage & will not revoke a devise made
in contemplation of such events & providing for the
future wife & children.

Per 563.

4 Co. 61.

1 and 181

Bar. 291.

4 Ke. 7100.

But if a female sole Tenant made a devise
nuptial, it is on Eng. principles clearly revoked
during coverture, so that if she die before the husband
it is revoked: for the chance of a will or devise that
it be in the Testator power to revoke or confirm it
but in Eng. a woman during coverture can do neither

Per 564.

Per 563.

In 2 Bar. 27th.

per

But if the wife survives the husband & thus becomes
again sui juris will it revive of course? according
to Per. it will -

Devises

Tithe v. Brainerd
31st 1805

In case the devise is not affected in then two cases any more than that of a man would be - for by an Law a woman may make a devise during coverture - sed qu. now for it has been decided that a feme covert can't devise

But an alteration in the testator's capacity of the testator to such a mode him incapable of making

Case 723. 566-5
4 Co. 61 a 26
1 And. 181. 11em 105.
1 Eg. ca. ab. 234

or revoking a devise, does not in itself work a revocation for upon this change, he has no will, no power

of revoking: ergo no presumed change of intention

qu. does not the same reason apply as well to the case of coverture? In the latter case the testator has changed his circumstances by marriage

Case 505. 592.

An act in pais amounting to an implied revocation may consist in an actual or intended alteration in the estate devised

Case 505. 597. 592.
2 Atk. 579. 11em 285. 94

Effect of an actual alteration - In these cases the revocation is the consequence of a positive rule of Law the intention of testator not regarded - not founded on any presumed change of intention. Locus in the case of revocations effected by an intended alteration

Case 505. 597. 592. Roll 675
1 Bos. & 595

The positive rule or principle referred to is this that as the testator must be seized at the inception of the devise of the estate devised, so the estate must remain in the same plight till its consummation i.e. it must in contemplation of Law ^{or in fact} have been in his seisin & remain so at supra

Case 184 - 6. 566. 611.

1 Bos. & 590.

Devises

375

Here, any alteration in the State between the execution
 & consummation of the devise which puts it in a differ-
 ent work is an implied revocation

Such alteration in the estate may be by act of
 the deviser, by act of a Donor, or by act of Law

First by act of the Deviser - e.g. Sale of the Land devised
 to a third person will revoke the devise. If a Donor having
 an absolute estate in Land, he makes an alteration in
 the legal estate only, retaining the beneficial interest
 or equitable estate, that revokes a prior devise of the Land -
 e.g. one Devising devised Land makes a Giftment of

it to a stranger to the use of himself in fee; Devise is
 revoked, for he holds the estate by the new limitation

as a new purchase. & he is 417. L. Burn. 1900 -
 1 Shaw 92-3. Holt 253 and vide 1 Will. 311. Don. 599-600. 1 Bosk 576. 7 D. 399

So if one having devised lands conveys it in fee
 then takes a conveyance of the same lands

The rule is the same tho the conveyance be by
 lease & release, in which case the actual possession
 or devise is not changed - in contemplation of law it is

So when one having devised Land made a marriage
 settlement limiting it to himself & children in
 fee & remainder to his own right heirs

So a conveyance of Land to the use of his wife
 will revoke a prior devise of the same Land -

Devises

Ans. 572-3.
2 Atk. 791, 579-803.
How. 6 B. 154.
1 Eq. ca. de 411.
2 Freem. 202.
4 Term. 1961. D. 194, 792 contin.

The preceding rule applies as well to equitable as legal estates, as if mortgagor having devised his equity of redemption conveyed it in trust for himself, the devise is revoked

And an alteration in the estate devised will operate as a revocation even tho the alteration made be necessary to give effect to the devise - e.g. - That in tail having devised concepts to A. for the purpose of having a recovery suffered to the use of himself in fee - the recovery is suffered, but the devise is revoked -

Ans. 583.
3 Lev. 108.
3 B. 11m 163.
2 B. 11m. 523.
7 D. R. 406.

So if a man covenant to levy a fine to the use of such persons as he shall name in his will & make his wife & then levy a fine in performance of his covenant the will is revoked

Ans. 581. 1 Roll. 614
3 B. 11m 170.
Atk. 341.

And the rule is the same tho the alteration made is expressly declared to be done for the purpose of giving effect to the devise, provided the donor is entitled as of a new purchase. Thus where one made his devise of a manor & then made a feoffment to the use of such persons as he had declared by his will bearing the signature of a

Ans. 582.
2 Atk. 577.
Moore 784.
1 Roll. 614.
2 B. 11m. 587. 7 to 799.
vide Ans. 656. that the signature of a

feoffment to the devise date - the feoffment was adjudged a revocation and it operated as a republication -

Ans. 582-3.
3 Atk. 503-4
2 B. 11m. 523.

Little Parthen. If a man seized in fee, but tenant, that he had made an estate tail, suffered a recovery to confirm his will to a revocation

Devises

377-85

Don. 887. 10th 573 And a specific devise of a lease for years is revoked
2 do. 168. 2nd term 209
3 P. 170-183 by a subsequent surrender & renewal of it -

Don. 586.
20th. 593.
R. 82. 319.
2 Fe. 418.

(And the rule is the same as to leases for years which
are renewable - ex. gr. one devises a lease holden for
& afterwards surrenders & takes a new lease for the same term)

But leases for years being chattel interests may
pass by devise notwithstanding a subsequent renewal

Don. 589-90. if proper words are used for that purpose - ex. gr.
30th. 174-7. 99 I devise all the estate in that I shall have in such
Park 237.
10. 170-575. a lease at my death - subsequent renewal does
not revoke -

If of the renewed lease is not complete at the
Don. 592-3 Testator's death, the devise is not revoked by the surrender
20th. 593 ex. gr. where Lemoir's seal was not affixed till after
testator's death -

And where the revocation depends on the
simple fact of an alteration in the estate inde-
pendently of any supposed intention to revoke, there
must be an actual & substantial alteration, or no
Don. 593. revocation - Thus formerly holden that if one devised
1 Roll. 175. land in fee, & afterwards covenanted to convey to a stranger
12th. 389. the devise was not revoked by the covenant -

But now as lots of Equity consider an executory covenant
to convey land as an actual conveyance, such a
Don. 594-5. covenant or agreement will in Equity be deemed a revocation
20. 170-329. if the covenant has a right to a specific performance
624.

Devises-

But a devise of the equitable interest in a trust estate is not revoked in Equity by a change of the Trustees & gr. vesting que trust Having devised cause his trustees to enfeof other trustees to the same uses - no revocation in equity - no alteration in the thing devised, i.e. the equitable estate -

Prod. 495-6
1 Pl. R. 23
2 Co. 109.

Prod. 595-8
Loy. 691.
— 684.

So if one Having contracted by articles for the purchase of Land, devises it & then completes the purchase, no revocation - the equitable interest not altered - his only taking the estate home

Doug 691

Loy. 684 or 710

Prod. 597.

4 Pl. R. 417. a.

1 Roll. 616.

Prod. 599.

1 Wils. 311.

30 H. 179

Warr. 679.

So if mortgagor Having devised pays up the mortgage & mortgagor conveys the legal estate to a trustee for the mortgagor, this is no revocation

So it is laid down as a good rule that if one Having an equitable interest in fee devises it, then takes a conveyance of the legal estate, devise not revoked - no alteration in the estate devised -

Prod. 600. 1c
1 Pl. R. 251.
2 Bacon 1191.
4 Co. 1462
1 Pl. R. 206.
005 -

When severall instruments taken together constitute but one conveyance, a Devise made in intervening time between the execution of the first & the completion of the last, is not revoked - For all the parts take effect by relation from the first instrument - ex. gr. Conveyance made to make a reconveyance, then a devise, afterwards reconveyance completed - When several things connected together to produce one legal result the last things in the order are supposed to exist from the first

A partition Between tenants in Comm. or Coparceners

1st Ed. 70. c. 1. ^{1170. c. 12}
 Pow. 682. if confined to that object is no revocation of a previous
 2nd 240. 241. devise by one of them — not an alteration in Devisors estate
 3rd 317. it merely ascertains what before belonged to him —

But if the act of partition is done to any other object
 than that of partition merely, it will revoke a previous
 devise — ex gr. If it contain any further disposition
 of the estate —

Note, where one has made an actual alienation
 in an estate before devised, no hard evidence is admis-
 sible to show that he did not intend to revoke. For
 the revocation is not founded on a supposed intent
 to revoke. It is an arbitrary conclusion from positive
 Law — presumptio juris de jure —

Secondly — acts in fact amounting to an implied
 revocation of a prior devise may be by an intended
 alienation in the estate devised — as if Devisor at

Pow. 505. kept a disposition which is ineffectual either
 — 505. for want of formalities or of capacity to take in
 1st Ed. 2. 349. the person to whom or — ex gr. one having
 3rd Ed. 74-3812. the devised land make a deed of feoffment of it
 1st Ed. 515. Pow. 506. with livery of seisin — or having devised a
 Moore 429. reversion make a grant of it, but the tenant never
 1st Ed. 105. attorns — or having devised conveys by deed of bargain
 Pow. 506. — Rule 515. & sale, not enrolled within 6 months.
 1st Ed. 108-112.

Devises

Com. 606-7. For such attempts to convey simply an intention to revoke.

Revocation thus effected being founded on a presumed intent to revoke, the inference may be rebutted by hard evidence - as where deviser on executing a deed of gift to his own use & benefit

as 608
 Owen 76. 90. 100. His intent not to revoke -

So by an intended alteration which becomes ineffectual this an incapacity to take, in the person to whom &c, ex. gr., one having devised to it afterwards devises to a corporation - this is a revocation - tho the corporation cannot take.

1 Roll 615-6-7.
 2 Ry. Ca. 26. 359.
 1 Bro. Ch. 480.
 9 Mod. 120. 10 do. 237.

So of a subsequent ineffectual grant to one who cannot take - ex. gr. grant of deviser's whole estate to his wife -

So an alteration in the estate devised working a revocation maybe by the act of a stranger, as if one having devised is divorced & dies before reuniting
 For the effect of divorce & the distinctions vide supra

Owen 62. 652.
 2 Ves. 441.

But a stranger cannot revoke a devise by tearing or cancelling it, if it remains legible

An alteration in the estate devised amounting to a revocation maybe by mere operation of Law.

Com. 612
 Dy. 142-3-4 ex. gr. devises made but not consummated before that
 1 Roll 616. 2 Ry. 290. of use were revoked by that Stat. -

Now. 614
New. 70.
A devise may be revoked absolutely or conditionally
in whole or in part only - absolute & total already considered
of Conditional & partial revocation.

20th 148.805
Lath. 188.
2d. 154
1 Km 329
Dy. 145th
Now. 614 &
18th 617.
A mortgage in fee, tho at Law an absolute revocation
of a prior devise, is now considered in Equity as only a
conditional revocation, pro tanto, i.e. to the extent the debt
secured. So that if devisee will pay the debt he may take
the land - La R^d 968. 2d. 11m 329.

Now. 619 &c.
2d. 148. 870.
R. 42. 2d. 154.
3d. 11m 329. 2d. 11m 329.
Rep. ca. 20. 410. — So if the subsequent disposition were an absolute
conveyance to a C^t that he might sell the land to
satisfy the debt & account with Test^r for the surplus.

But a mortgage for years only is even at Law
only a revocation of a devise in fee for the term. The
reversion passes - In Equity 'tis only a conditional revocation
pro tanto: so that devisee may take immediately on paying
the debt.

Now. 617.
8 Km 150.
7th 102. 410.
3d. 148.
But a mortgage whether in fee or for years is
an absolute revocation as well in equity as at Law
of a prior devise if made to the devisee. devise & mortgage
inconsistent - same prior mortgage & mortgagee
case of Rever. Pross led vide. 5 Ves Jr 656. that even a
mortgage in fee is no revocation - 3 Km 241. 800 -

Now. 619 & 4.
Rever. Pross
Revocations pro tanto may operate by diminishing
either the quantity of interest or the subject matter
devisee —

Dev. 524-5.
1 Roll. 510.
Law. C. 23 in fine

1st Thus If one devise in fee & afterwards lease to a stranger for life, the devise is revoked only so far as the estate for life, i.e. during the life of Lessee — not as to the fee

Dev. 524.

So if one devise an estate on condition & afterwards exchange the condition, the condition only is revoked & the estate devised is absolute —

Dev. 524-5.
Comp. 40.

So if one devise to A in fee & afterwards by a subsequent instrument make a devise of the same land to B in tail the second devise is a revocation of the former to the extent of the difference between the two —

Dev. 526. Bro. P. 44 &
5 Re. 1st 656. 930. 47
600. —

But tho a lease to a stranger is only a revocation pro tanto of a former devise in fee, yet a lease to devisee of the land devised to commence from devisors death is a total revocation — Devise & lease inconsistent — one person to be at the same time Lessee & devisee — case of mortgagee supra

Dev. 526-7.
Bro. P. 47.

But a lease to devisee to commence in devisors life time is no revocation qu. not for the term for it may determine before devisors death & so stand with the devise —

Devises

47.
338-

2^d As to revocation diminishing the subject matter -

If one devise three manors to A & then revokes as to one of them, the devise remains good as to the other

two - one devise lands to his daughter & afterwards a

2^d man marriage settles a part of the same land upon her

The devise as to the residue remains -

11th. Revocations under Eng. Stat. of Geo. 4th c. 20

The Stat. in this Stat. enacts that no devise to shall be revoked otherwise
revocation in N. York. than by some other will or codicil in writing or other

writing declaring the same to be revoked, tearing, cancelling
or obliterating the same or unless the same be

attested by some other will or codicil or other writing signed

in the presence of three or more witnesses, declaring the
same to be - Note the requisites prescribed in the devising clause -

Holden that this clause of the Stat. ^{applies} not only to devises
of land strictly so called, but also to legacies or sums of

money charged upon land - Both to be revoked in the

same way -

It does not affect implied revocations, i.e. such as are

affected by a subsequent inconsistent disposition - marriage

& birth of a child &c. - It relates to express revocation only.

The former remain as at Com. Law -

Revocation under the Stat. then may be by some other
will to as prescribed in the first branch of the clause.

Don. 8278

1 Roll. 674

2 Rev. 720

1 Bp. ca. 264123

2 do. 771. n

2 do. 268

Don. 47-8

Don. 630

2 do. 272

Don. 630

Earl. 81

Sec. 631.

by burning &c. or by some other will or as prescribed in the third branch.

In pointing out the two first modes of revocation the Stat. seems to be only declaratory of the Com. Law except that the words "will" or "codicil" in the first branch of the revoking clause, are construed to mean

Cor. 47-8

such a will or codicil as would be suff^t to pass land within the prior devising clause: for after the devising clause a will of land not complying with it would be void & therefore not a will of land -

do. 632.

Whereas the instrument contemplated by the last branch, not being referred in construction to the words "will &c" in the devising clause is construed

as to Revocations
in ac. 243

3 Mod. 218, recognised in 4 Burr
Co. Law 199 by Ed. Wainwright
10 Wm 315. 502. 1 Plow 537.
Flour. 611. Co. 4th. 87. 3rd. 497.
2 Plow 293. 7 Plow 344 n 469. -
2 Wash. 558. East. 81. 4 Burr 2812.
Cro. Jac. 497. 7 Cr. 348.

to be an instrument of revocation merely, and not requiring the solemnities prescribed in the devising clause.

(Consider the first & last clause together)

Hence a distinction intended merely to revoke a prior devise & one intended to make a new disposition of the same land & also to revoke -

Cor. 547-8

The former, i.e. one intended merely to revoke will be effectual if it comply with the requisites prescribed either in the devising clause or with those prescribed in the third branch of the revoking clause & the latter -

Devises --

385-

10 mod. 467 For if it comply with the requisites in the devising clause
 Com. 147. 8
 11. N. 233. is effectual according to the first branch of the working
 54. 5. 6. 61. 460 clause.

But a contra if the latter instrument is intended to be both a disposing & working instrument it will not be effectual unless it conform to the devising clause, i.e. attested in Testator's presence

Com. 648 32-37. for the intention is to give to the second devisee
 3 mod. 258. 288. 77. what is taken from the first or rather to take
 11. N. 313. 216. from the first only what is given to the second
 741. Co. Cl. 529.
 2 att. 272.
 Reg. ca. ab. 409. But nothing is given to the second, ergo

1 Ks. 177. But a devise to Testator's heir at Law tho' void
 revokes a former devise if duly executed

But a disposing & working instrument need not comply with the requisites of both clauses - If it conforms to the devising clause, the working

How 5356 words are effectual within the first branch of
 3 Mod 206 the working clause - Indeed if good as a disposing instrument, it would be effectual to revoke impliedly with words of revocation i.e. it would revoke as at Com. Law.

As to revocations by burning, cancelling, tearing & obliterating, revocations thus effected remain at at
 Com. 131. - Com. Law. To effect a revocation in either of these ways, 'tis necessary that the burning &c. be by

Law. 639-30. His intention. Locus no revocation, i.e. if it remain
 De 652 intelligible - Suppose the devise destroyed, may the
 contents be proved - No such case I believe. Note the
 24th. 280.
 1 Will. 16. Sta. 1186. analogy to deed lost or destroyed by theft or accident.

3 will. 508.

Law. 633 or

Const. 52.

11. Wm. 346.

2 Wm. 741.

10. Wm. 344 Case 82 =

Revocations effected by these acts are in the
 nature of implied revocations, as Com. Law. Hence
 the acts themselves tho done by Testator are not
 considered per se as revocations, but as furnishing
 evidence of a revoking intent. "Ante and or visible
 signs of such intent."

Of course they amount to revocation
 or not as they are done or not animo revocandi

Thus if Devisee should throw ink instead of sand

Law 634. Const. 52.

11. Wm. 346. 347. 508.

4 Penn. 2515.

on his desk or having two shovels by mistake
 cancel the latter instead of the former - there would
 be no revocation -

But it is not necessary that the devise be totally
 destroyed - Even the slightest tearing or if accompanied
 with a declared intent to revoke, will be a revocation
 as where one slightly tore his devise & then threw
 it on the fire - but it fell off & was taken up
 but he declared that it should not be his will in

Law. 635-8.

2 B. R. 1043.

Law. 636-7. Com. 453.

15. Wm. 346. 2 Wm. 742.

Const. 49. R. Ed. 400-1.

2. 54 & 81)

So if there are duplicates of a devise & testator
 one part animo revocandi the other is revoked.

These acts depending for their effects on Testator's intention amount in some instances only to dependent and collative revocations, i.e. when done with reference to another act intended to effect a new disposition - their revoking effect depends upon the efficacy of the other acts - Thus where one thinking that a new devise of his estate was completed, when it was not, tore off the seals from his first devise, & on being informed otherwise desisted but he was sorry he, & never completed his subsequent devise - the first was not revoked. Note the analogy to the case of a disposing & revoking will -

1 Bwn. 2875.
Com. 451.
Caw 638.
1 Bq. ca. ab. 409.
3 Bq. ca. 155.
10. Wm 343.
2 Bq. ca. ab. 776.
8 Km. 140.

A will obliterated in part by Testator animo revocandi may be good as to the rest; thus where

one having devised all his estate to A, except, &c. afterwards struck out the exception the part not obliterated remained good -

1 Bq. ca. 155.
10. Wm 343.
2 Bq. ca. ab. 776.
8 Km. 140.

An instrument made under the revoking clause of the Stat. not valid tho Testator's signature is on the

face of the instrument, unless it was intended to rather treat the revoking part -

As Stat in Gen. on the subject of revocation the rules of the Com Law generally apply here in re to revocations by parole -

Devises of Replication

A devise, tho' revoked, if not actually destroyed, may be revived by a subsequent replication —

Case 652

For being ambulatory till testator's death, it may, as well be confirmed or revived —

do —

And before the Stat of Frauds, a partial declaration were suff^t to revoke, so they were suff^t to republish a devise —

I. of Replication at Com Law — II. As they stand since the Stat of Frauds & Perjuries —

do — 3

I. At Com Law, replications were much favored of course very slight words would effect a replication

West 22-3

2 Shm 48

Will 344-418

Case 655

44 113 26

Roll 678-629

Thus if one having made a devise of his land, should purchase other land & then deliver his will as his will or verbally declare that it was his will, it would be republished & the land so purchased pass by it —

So if one having devised all his land to his El^d & afterwards purchased other lands, should be applied to to sell the latter & should reply, no they shall go with my other land to my El^d, the devise would be republished, & would pass the lands thus purchased —

2 Vern 209

1 Green 266

Case 653-4

Cro. 6. 193-

Moore 404

2 Ch. R. 72-3.

Devises

Personal property only, will amt to a republication of a devise
 for the a farther part of the last will, whether expressed
 to be so or not, & considering his will as existing
 (and being made in addition to it, is of course confirm-
 atory of it, so far as it does not revoke: as to the
 question under the Stat of Frauds & under Can. 589 is
 opinion contra -

2 Vern. 621.
 1 Ves. 689. 442-3 - At any rate the annexing a codicil, or the
 execution of one not annexed, if it expressly confirm
 the devise will be a republication: e.g. 12thly, confirm
 the devise will be a republication: e.g. 12thly, confirm

Can. 588. 661. Can. 781 - At any rate the annexing a codicil, or the
 execution of one not annexed, if it expressly confirm
 the devise will be a republication: e.g. 12thly, confirm

Can 663-8. 4
 1 Ves. 3489.
 - 442. It seems any words in the codicil showing
 an intent to confirm will amt to a republication
 ex. gr. "I desire that this writing may be a farther part
 of my last will & testament"

Of Republication since the Stat of Frauds &
 Section the Can. Stat of Frauds nor can Stat. makes
 any express provision with respect to the republication of
 devises - But as the effect of a republication is

Can. 80-2. 584-586. the same as that of devising, his holden that no codicil
 586. 1 Vern. 329. or writing can amt to a republication of a
 22th. 2. 187. 12thly 182
 1134. 440. 9 and 10. devise of Land is unless it comply with the
 Statute 142
 require of a devise.

Can. 664-5. 588.
 11th. 329. Comb. 84. } And republications then are at one end

Devises

311 77

Nov. 1874
 Nov. 1871, &c.
 Const. 113.
 Gen. 58
 Wash. 1874, 1875, 1876.
 No codicil says Power can amend to a republication, unless it comply with the forms &c. & be signed & published by the Testator in the presence of three witnesses.

Dr. Must Testator sign in the presence of the witnesses? This not necessary in the original devise. The case cited from Comyns does not warrant the position. There the codicil was thus executed & had no force, but such execution not adjudged necessary.

Nov. 1874
 Sep. 6th 1877
 Wash. 67.
 The codicil should indeed be published in the presence of the witnesses. decided in law that a parol republication is not good -- 1 Root 32-3 contra - 1877.

But the operation of this Stat. does not extend to implied or constructive republications as the revoking clause does to implied revocations. -
 Nov. 1874
 Jan. 1877
 Nov. 1877, 1878, 1879.
 4 Nov. 1875, 1876.
 To devise of lease hold estates are not affected by this Stat. rec. of term for years. But Nov 1874 not under an estate for term of years.

Under the Stat. as at Common Law no express words of confirmation are necessary it seems in a codicil to republish a devise - subject if the devise is virtually confirmed, ex gr I devise that this writing may be a future part.

Nov. 1874
 Jan. 1877
 40
 2512
 To also by the better opinion every codicil to a devise tho not annexed & even tho it dispose of personal estate only will amount to a republication if executed according to the Stat. ex gr. one devise of real estate

Conn. 68-9. 116. 485. I then merely execute a codicil giving pecuniary
 causa infra 68-9. 554 legacies, but execute at supra. Contra 364 R. 90
 Conn. 381. 9. 77. 150. 484
 L. C. 2 Kern 921. can cited 116. 489. Conn. 679. 681.

Comp. 120.
 If one having devised all his copy hold purchases
 more & surrenders them to the use declared in his
 will, this surrender is a republication & passes the
 latter - But here nothing in 3 of the Stat of Grants
 & its requisites I suppose were not complied with -
 But this seems to be an implied republication
 & I en. whether such republication is affected by the Stat.?

Conn. 674. 683. The effect of a republication is to give the
 devise a new date so that the devise after re-
 Comp. 120. 154. 150. 93 publication will include all such property & all such
 4 do. 601. persons as it would have comprehended if originally
 made at the time of republication - Whereas a

2 M. 161. 529. 150. 304. devise not republished will extend to no estate which
 Comp. 120. 132. the testator had not at the time of making it -
 Conn. 130. 132

Hence if one having devised all his lands in
 Conn. 674. Sub. 499. & purchase other lands lying in A & then republish
 4 more 404. Conn. 381. the latter will pass -

Conn. 674. Conn. 381. So if having devised all his real estate, he
 7 mod. 78. 116. 462. 150. 204/ purchases more land & then republishes -
 both 748. 750. 472

Conn. 675. 116. 475. So if one devise to his son A & to his 1. & testator
 3 Feb. 84. 56. 68. afterwards his another son of the same name & then
 republishes, the latter will take -

Devises

464.
373-

If a man devise land to his daughter not to be
subject to any controul of her husband, she then
having a husband, & after the husband's death repub-
18 R. 193. lishes, taking notice of the husband's death, the restric-
tion extends to any subsequent husband -

But the effect of a republication of devises no
further than to give the words of the devise the
same operation as they would have had if origin-
ally written at the time of republication -

Where if one devise land called blackacre
& then purchase land called whiteacre republished
whiteacre will not pass - If having devised
all his land in A, he purchases other land in B.
10 R. 676. & republishes, the latter will not pass -

Hence also words introduced in the original devise
as words of limitation cannot by a republication
be made to operate as words of purchase or description

1 R. 1 mod. 267 & 268 373.
20-4 R. 507. Thus if one devise to A & the heirs of his body &
1 R. 12. 394 & 400. after his death republishes, A's issue cannot take -
1 R. 389, 608, 112.
1 R. 11 R. 394. 397. 398. 399. 1 R. 32. 219.

Where one having devised land to his son
& given a legacy to his grandson B republished
after the son's death - it was decided that the grandson B
could not take the land, for testator having said the word
grandson seemed that he did not intend to designate his grand-
son by the word son -
1 R. 676-9.
3 mod. 373.
1 R. 340.
R. 401.
2 R. 263.
2 R. 69.

Willis 297.

Tell. 44. -

10th. 581.

Note - Testator's intention is to be collected in part from a reference to the state of things existing at the time of making this will, not of his death -

A Codicil may republish a devise as to part of the subject matter only - e.g. one having devised his real estate to two, revoked it as to part of the estate by settling that part upon one of them, & then by codicil confirmed it subject to the settlement -

Pow. 679. 680.

2 P. W. 327.

holden that the other part should go to the two

Pow. 680. 2.

102. 110.

But a codicil cannot give the original devise any inherent reality which did not before belong to it - Its effect is to set it up in the same condition in which it was at its inception -

Pow. 680. 2 102. 110.

P. W. 327. 2 Hen. to the Stat.

597. Part. 75. Holt 762 confirm it -

Com. 174. 2 mod 262. Burr. 554

Hence if the devise itself is not executed according

Pow. 683. 586.

2 10th. 593.

Ld. Hardwicke once said obiter that if a man devised thus "all the lease which I now hold" & afterwards renew his lease those renewed would not pass by a republication. In. for the words have the same effect as if the devise had been made at the time of republication -

Pow. 683. 5.

A devise may be republished by mere re-execution & such republication may supply an original want of capacity in the deviser -

Can. 686. et. gr. an Lft makes a devise & after full
142. 162. age re-execute it—
142. 549.

Can. 686. 142. 162. An Lft may republish on the very day
142. 549. an which he comes of age—no fraction of a day

Can. 689. Nothing which does not amount to a republication
Comp. 132. at Law will amount to it in Equity—

Of the Jurisdiction of Courts as to Devises—

Can. 118. The ecclesiastical Cts in Eng. have no

3 Ke. 20 Jurisdiction over Devise of Land only— & a

11 Ke. 209. prohibition lies to prevent from proceeding in

Law. Can. 396.

2 Roll. ab. 315. 11

2 East 552. 8.

the probate of devises—

But now if the same instrument contains

Can. 688-9. 105. 5.

2 East 57-8. a devise of Land & a bequest of Chattels, it may

1 Roll. 315.

142. 141.

Can. Can. 396.

6 Ke. 22. Law. Can. 396.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

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142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

142. 141. 142.

be proved in these Cts for the necessary as to the
person's estate— But the probate is as to the real

estate of no avail— not evidence at Common Law—

as to person's property the conclusion— a prohibition may

as to person's property the conclusion— a prohibition may

formerly granted against the Land— 2 East 57.

In Con. devises as well as wills are proved by 40 Appellate

but an appeal to the Lft Cts lies from this decision in all cases—

If the sentence of probate is affirmed, no further proceeding may had—

If not the cause is remitted with directions to the Judge to conform

the decision of the Lft above— But there is no need of an appeal in

any question of title to real estate the sentence of the Lft is not

evidence of title in such case, the Lft or Devises may

immediately sue at Common Law any sentence of probate not well

standing—

Devises

The division of an estate between a testator or intestate under the order of Probate settles the proportion of those entitled to it - unless it is shown on the appeal to be erroneous, but has no effect on the question of title -

Can. 595-91-4. 170 Col. of Chy. will not set aside a devise upon a suggestion of fraud in the making of it - for if the suggestion is true tis no devise - & whether tis a devise or not is a question of fact to be tried at Law by a Jury on the issue devise or vel non. Terms of a Deed - Can. 592. 26 Wm 270 -

Similar to the question on non est suggestion pleaded to a Deed -

Can. 593-5. 30 Wk. 744. Is whether Testator was comp. for or not is a question of fact to be tried at Law -

Can. 599-5 2 Wk. 424. Is. If an issue devise or vel non is sent out of Chy. & a verdict for the heir, does Chy. in these cases on the issues being thus found proceed to set aside the devise, bill being filed for that purpose or do the proceedings in Equity cease?

But there is a distinction between Chy. setting aside a devise for fraud, & its taking from the devisee the benefit of a devise procured on a confidence which binds his conscience - The latter may be done; for here the existence of the devise is not questioned but the Ct. decrees that devise shall stand for the benefit of parties aggrieved. The ground of jurisdiction is distinct & runs that over the Devises & Chy. -

Devises

377th

It is over the conscience of the Deviser: ex gr. If it agrees to give B a \$1000 in bank bills in consideration of B's devising lands to him, & the bills are forged, A can be made trustee for B's heir, for the breach of confidence which, in Equity is a fraud -

Row. 696. 7.
10. 11th 288.
2. Row. 699.
- 700. -

On a similar principle the holder on the other hand that if one being about to provide by devise for his younger children is dissuaded from doing it by the heir promising to make the same provision the heir is compellable in Equity to perform his agreement.

Row. 697. &
Ch. Ch. 4.
Inund.

and where one devised land to be exchanged for college lands for A - College would not exchange Bly decreed that A should have the land intended to be exchanged -

Row. 698
2. Ch. 504

In genl. questions arising simply on the words of a devise are to be determined at Law - But Chy may decide questions of this kind if there are circumstances requiring equitable interposition -

Row. 699.
30. 11th 290.

Where the issue deviseant vel non is directed out of Chy - that Chy will mould the evidence & direct the application of it so that a fair investigation may not be impeded. or Chy may direct that one of the parties shall produce certain deeds or writings, that he shall not

Devises

Rev. 700-1.
30 Nov 296.

At up such & such an unconscientious defence
as that he shall admit a copy in evidence instead
of the original devise &c -

if giving a devise in evidence at Law

Rev. 700.

The best proof of a devise is the production of the
instrument itself; & regularly the best ^{possible} evidence is
required in all cases - viz when one claims under

Rev. 702. 2 Nov 3571. a devise relied upon a bill in Chy exhibited by the heir
1 do. 117. Comb. 395. (the bill) & reciting the devise, it was holden to be no
evidence -

Rev. 702.
Comb. 46.

So a devise exhibited under the great seal is no
evidence to a Jury in Ecclesiastical

Rev. 703
Comb. 248.

So the probate of a will in the spiritual Ct is
no evidence as to a title to Land - as to land the
proceedings are coram non judice.

Rev. 703
2d R 732. 744.

Hence the probate of a will of Land in that Ct
is not evidence even if the will is lost - for such
probate is a nullity -

Rev. 708-71.

But yet too said that the probate of a devise ut
supra accompanied with other circumstantial evidence
is admissible if the devise is proved to be lost -

And it seems that if a devise remains in Chy by order
of the Ct a copy of it is admissible for 'tis a roll of the Ct.

Indued where the C in which it is lodged has jurisdiction
 over the subject matter; a copy; i.e. an official copy
 I suppose may be read

But if proof of the attestation is required that must
 be proved by a subscribing witness if either of them is living
 This is a fact not provable in its own nature by copy

If there be a probate of the will in Chy
 is not that conclusive evidence as to the fact (book)

at Law however one of the witnesses is suff.
 to prove what all have attested - But he must be able
 to testify not only that Testator executed but also

that the others did the same - seems he does not fully
 prove the execution according to the rules of it
 devise maybe read to the jury

and tho the witnesses are all present, tis not
 necessary that they all testify to the fact of attestation etc

- cutting & publishing - If it were an obstinate witness
 might defeat the devise.

But if one of the witnesses refuses to swear, it seems
 necessary to prove the fact of his attestation -

and the subscribing witnesses are allowed to deny
 the facts which from the face of the instrument they are
 presumed to have attested - ex.gr. thin our attestation
 Contrary to this justice Yates that they could not testify against
 the instrument

Devises

Testator said, on his signing - (reporter lost contra)
 But the testimony of the subscribing witnesses is
 not conclusive of devisee - If they should deny
 even their own subscription, devisee might
 contradict it by other witnesses. Same as to Testator
 sanity & -

Par. 711.
 Tr. 1896.
 1 B. R. 365.
 Pult 264

on the other hand, their evidence if in favour
 of the devise is not conclusive of the heir - He
 may contradict them -

Par. 710-12
 Kin. 79. G. & R.
 264 -

But a Ct of Chy will not direct an issue to
 try the sanity of the Testator, when the subscribing
 witnesses swear that he was sane, unless the
 suggestion to the contrary is supported by some direct
~~evidence~~

Par. 712.
 3 W. 359.

Of proving a Devise in Chancery

Is usual in Eng. when a title to real estate
 depends upon a will to prove it in Chy -
 especially if the will is of modern date -
 It is ~~not~~ recorded as probd

Par. 714.

The probate of a Devise in Chy is in effect
 conclusive upon all persons, & presents its being
 disputed afterwards even in a Ct of Law - For if
 the heir or any other should ~~after~~ the decree
 attempt to contradict it, Chancery would issue
 an injunction of him -

Par. 718 -
 1 W. 26.

Devises

401. ~~402~~

In Gen. bly Lrd has no concern with the probate of wills or devises
 Cons. 7/4.
 2 Oct. 190 But bly will not declare a devise proved unless the
 heir is forth coming. - i.e. to be found & heard against it

It has been holden that such a probate of a
 Cons. 7/5
 30th Apr devise is not necessary however in order to establish
 a particular claim under it even in Equity -

(And tho the Lrd is voluntarily makes default
 Cons. 7/8
 30th Apr yet the devise will not be declared to be well proved
 as of course - proof must be made as if contested.

The probate of a devise in bly being thus
 conclusive, it is an established invariable practice
 in bly never to decree a devise proved unless
 all the subscribing witnesses are examined - for
 Cons. 7/17-
 Cons. 7/18-
 1st Dec 216 the Lrd has a right to claim that all of them testify
 before he is disinherited -

In Gen. the practice of bly of probate is to declare
 a devise proved on the oath of one of the witnesses -
 But the probate here is no evidence of title -

And the rule is the same in Eng. tho one of
 the witnesses is beyond sea - Lrd said writing
 Cons. 7/9-
 2nd Dec 459. cannot be proved for it is not presumed to be
 out of the power of the party claiming to obtain
 1st Dec 624. Lrd's evidence -

Devises

When a commission issues from Chancery to take Depositions to prove a Devise, the Devise is itself delivered out of the ~~Office~~ office on Security being given — & in some instances Chancery has ordered the prerogative Ct to deliver it out on proper security —

A bill to perpetuate the testimony of witnesses to the devise of a Lunatic will not lie in his life time — The Lunatic may recover & revoke —

Nov. 721-3.

Gr. 981.

12th. 627-

2d. 627-

above 2 Kells 610-

Nov. 123-4

1 Kern. 105.

1 By. ca. ab. 234.

See page 1.

Devise

When a commission

to take depositions

is itself delivered out

being given - &

Has ordered the

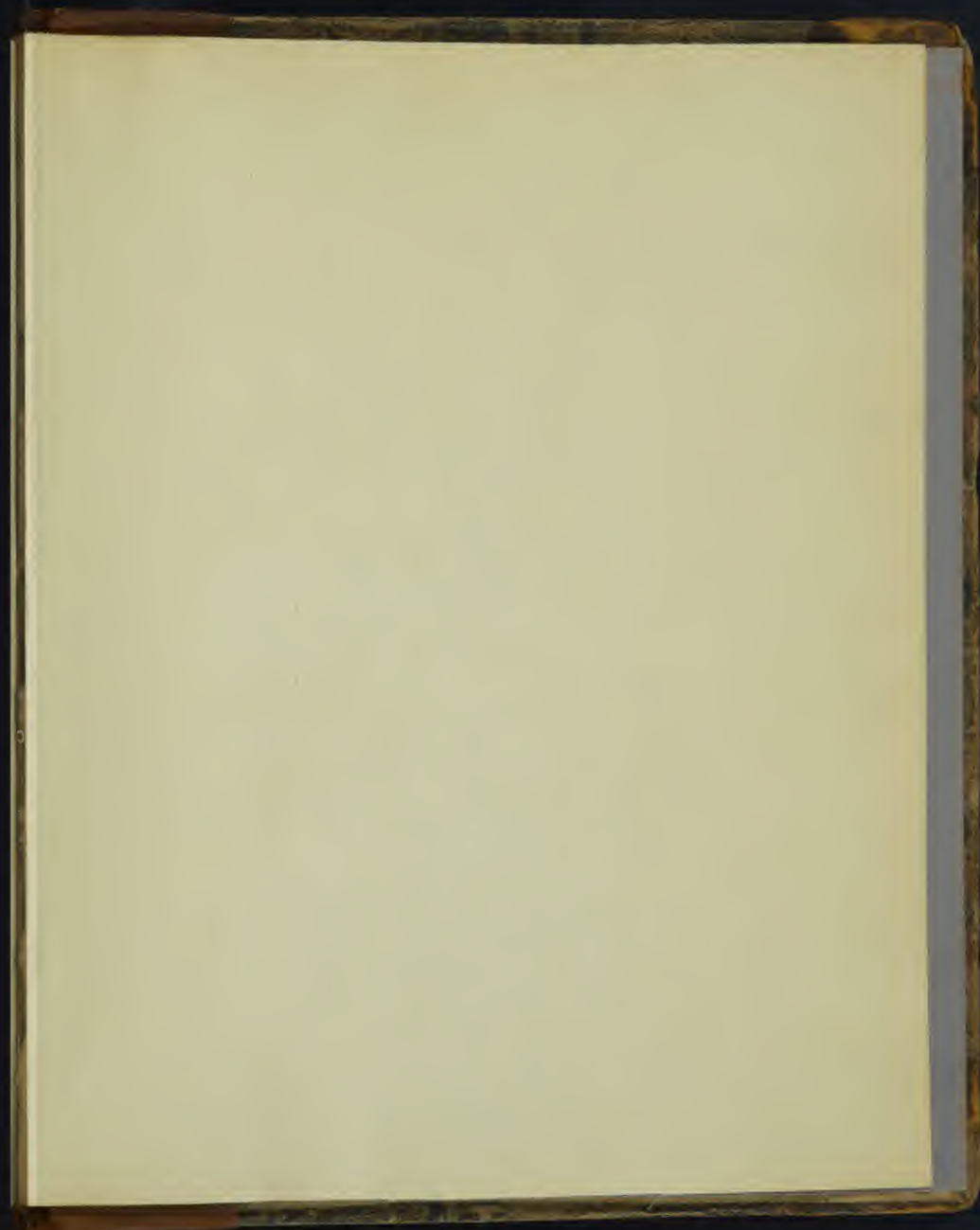
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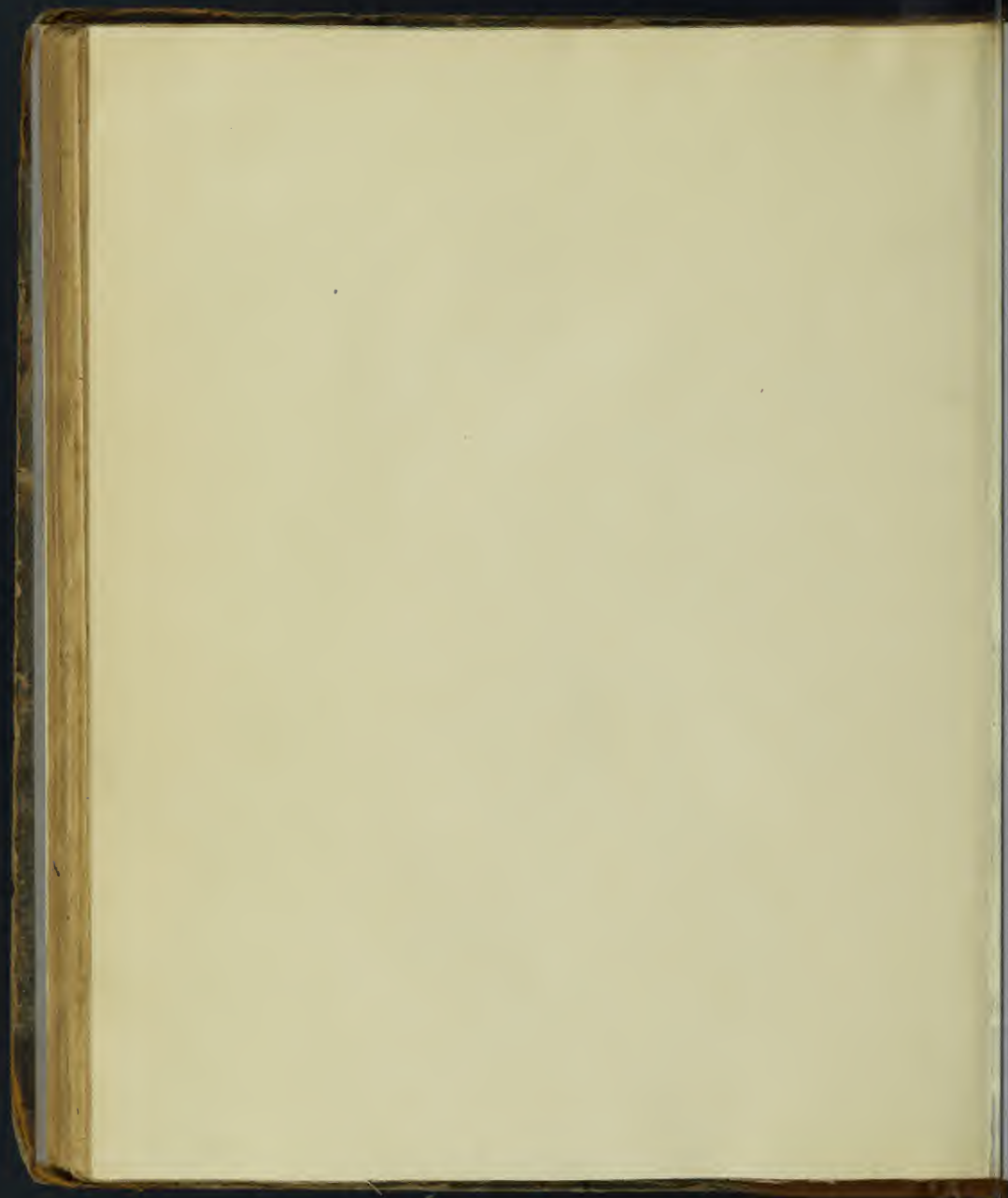
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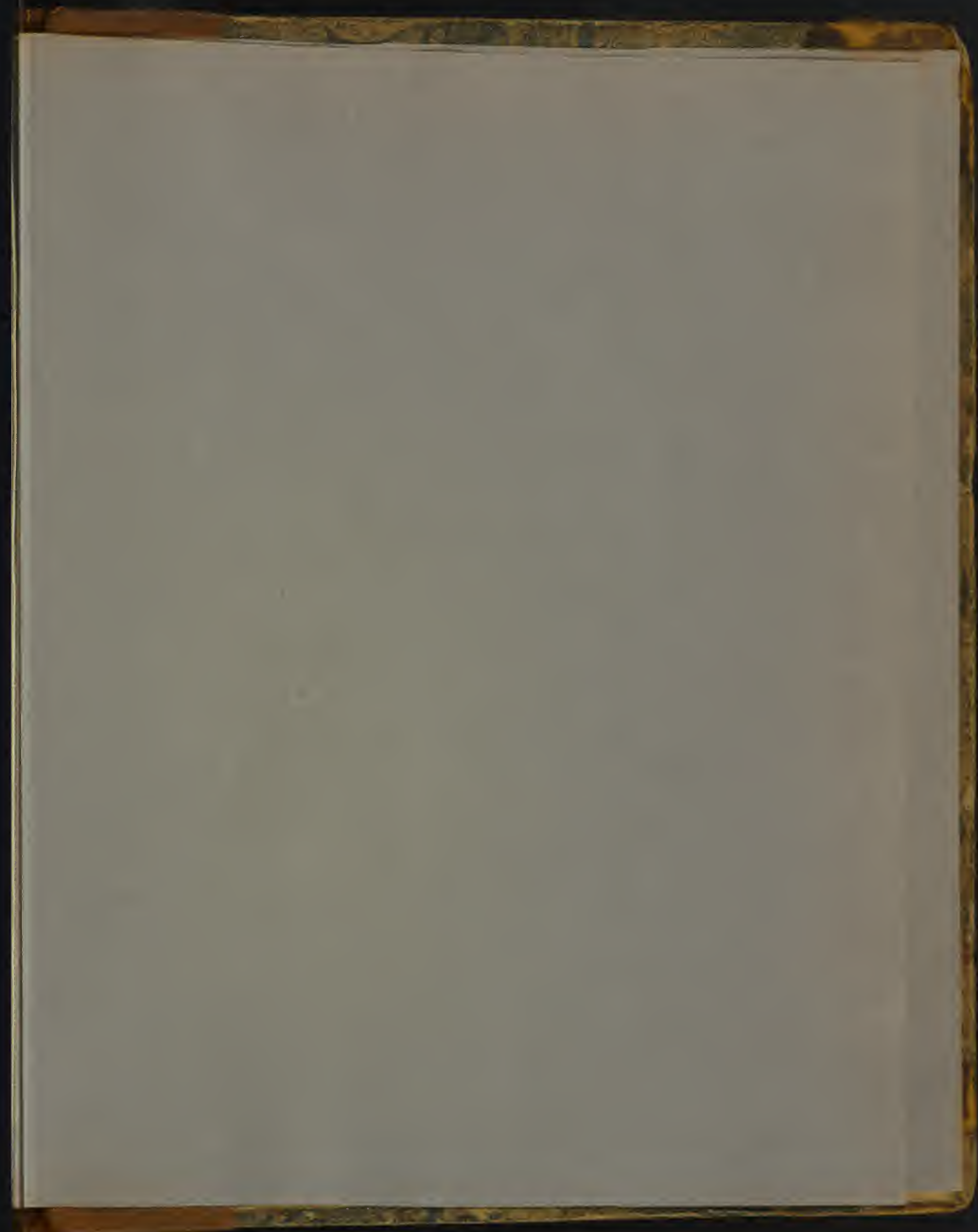
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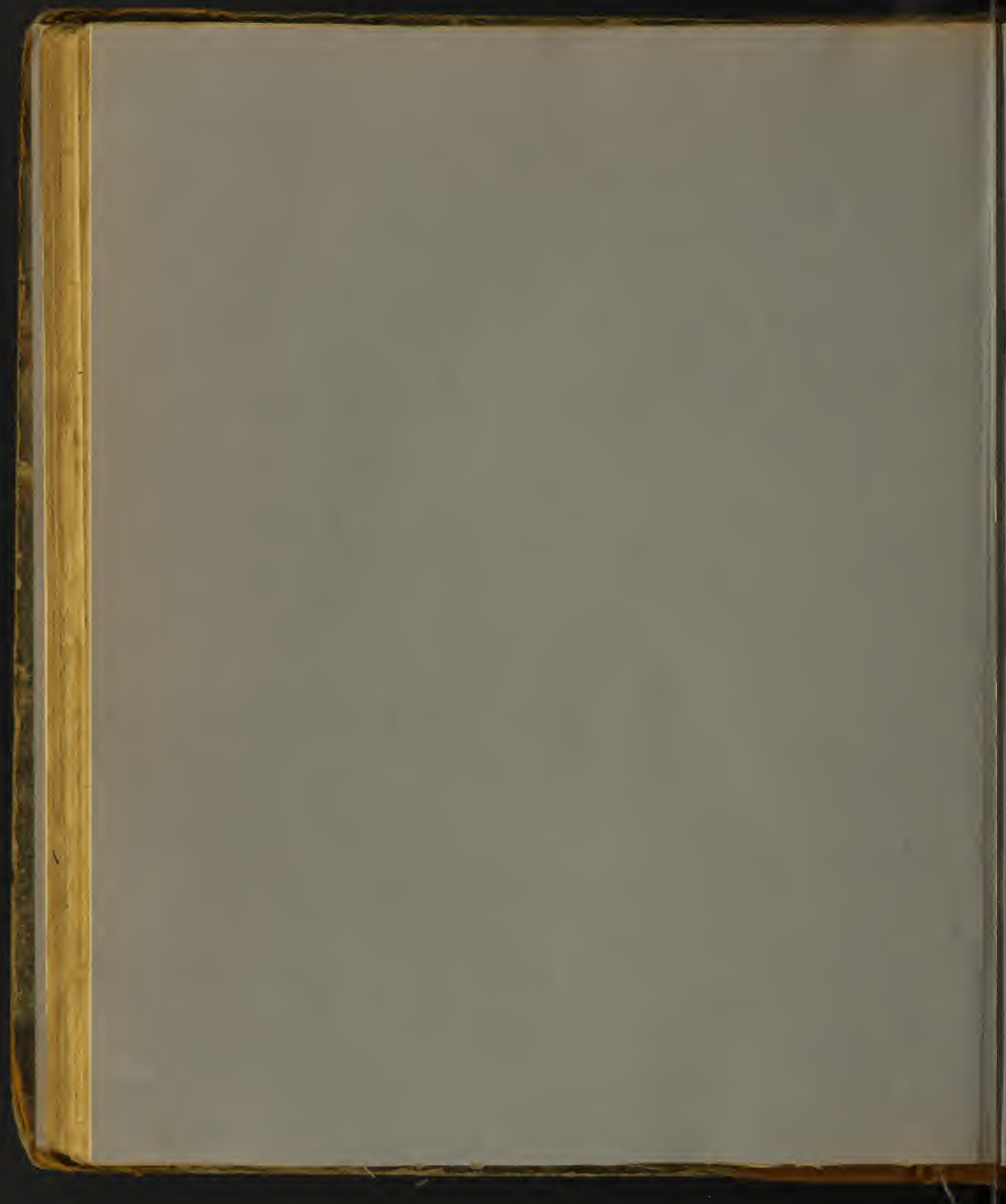
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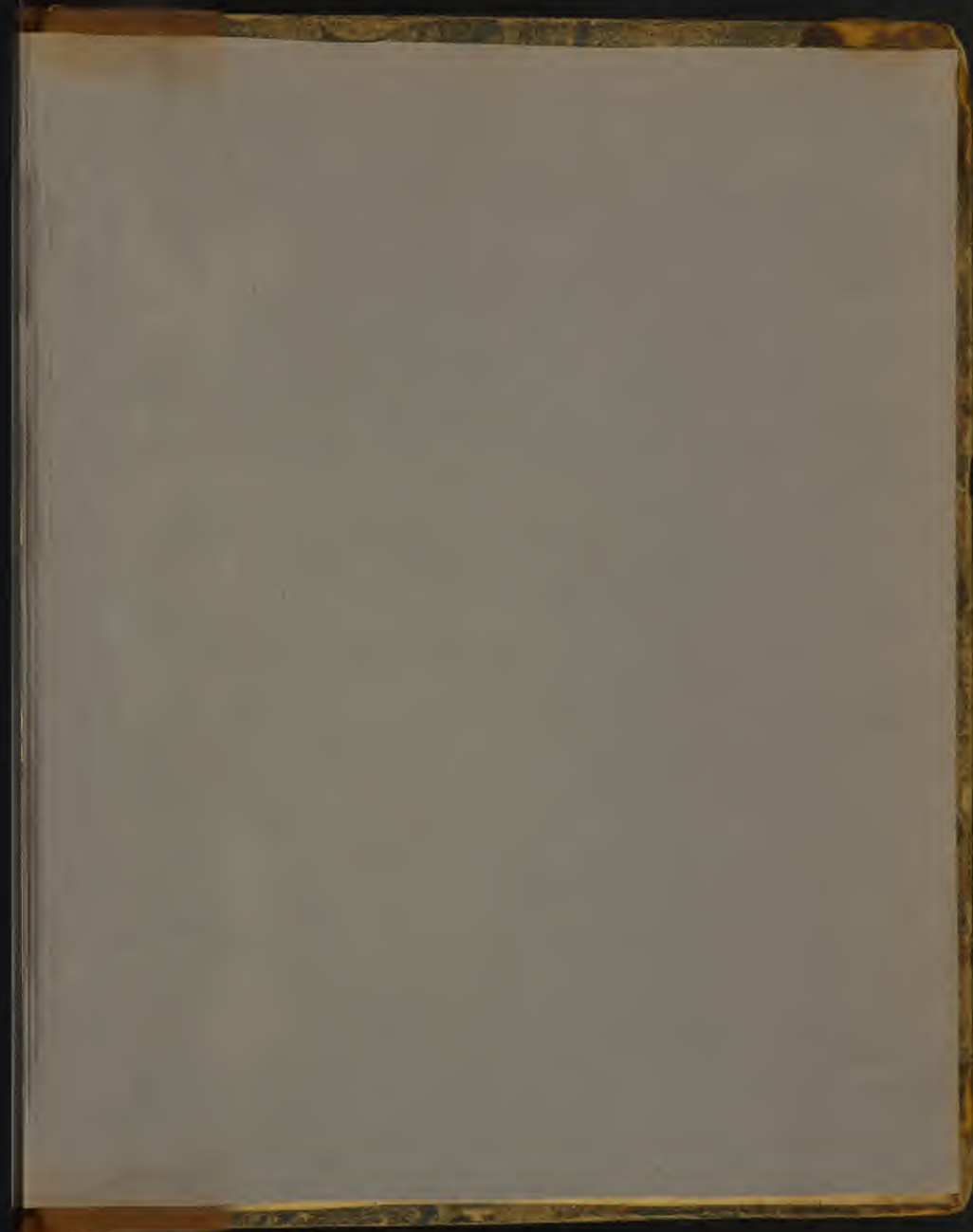
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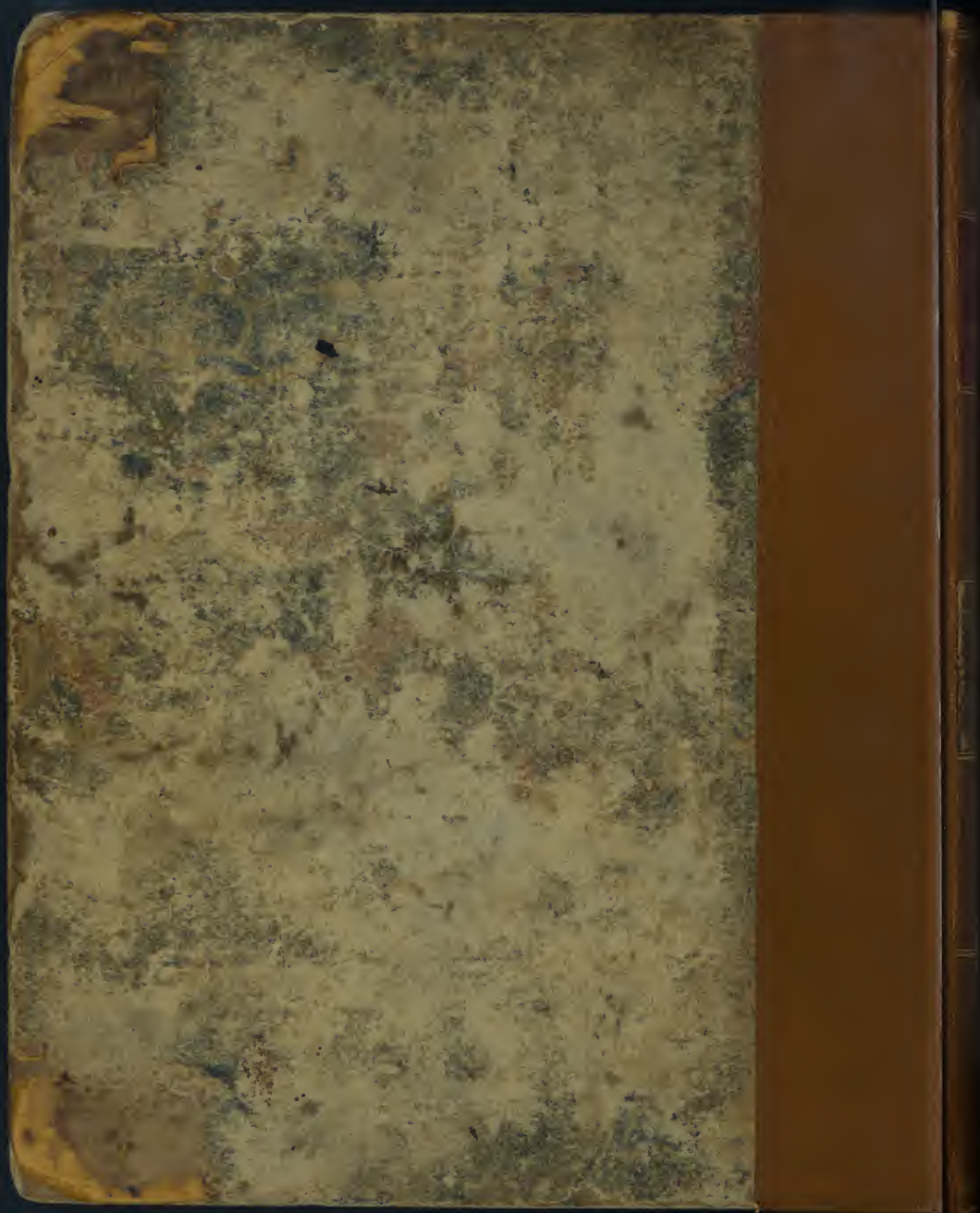












REEVE &
GOULD'S
LECTURES

VOL. 4
